Petition

81-1369

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1981

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend for Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as a Class,

NANCY BRECHEISEN, a Resident and Taxpayer of Harris County, Texas,

BONNIE B. DUESING, a Resident and Taxpayer of Harris County, Texas, and

MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas,

for themselves and all other Residents and Taxpayers of Harris County, Texas, who are situated similarly, as a Class,

Petitioners,

v.

HARRIS COUNTY HOSPITAL DISTRICT, a governmental body or political subdivision of the State of Texas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Texas Court of Appeals, in an original proceeding for temporary injunctive relief under Texas law, violated the U.S. Constitution (due process clause of the 14th Amendment and the 9th Amendment) when it refused to enjoin temporarily the Respondent, which is a political subdivision of the State of Texas, from its performance or its assisting in the performance, at its facilities, of

- all abortions affecting the Petitioners (exclusive of maternal life-saving abortions), and
- all experimentation, physical abuse, etc. on Petitioner Children who "survive" abortions,

for purposes of preserving the Court's jurisdiction over a pending appeal before it involving such Petitioners and in a context where the Harris County Commissioners Court approved the Respondent's current operating budget *only after* Respondent had eliminated budgetary funding for its abortion clinic;

2. Whether *Roe v. Wade*, 410 U.S. 113 (1973), applies to such a proceeding and, if so, whether it operates to bar the granting of the temporary injunctive relief sought;

3. Whether an unborn child is a "person" under, or has a legal personality cognizable by, the U.S. Constitution;

4. Whether this Court should reconsider and overrule *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 179 (1973), in light of certain:

a. Factual matters presented by the instant case which were not before the court in *Roe* and *Doe*;

b. Legal matters presented by the instant case which were not before the Court in *Roe* and *Doe*; and

c. Consequences or results of *Roe* and *Doe* which were not intended by the Court;

5. Whether the Judgments and Decisions of this Court in *Roe v. Wade* and *Doe v. Bolton* are void as violative of the United States Constitution (due process clause of the 5th Amendment, the 9th Amendment, the Division of Powers Concept as guaranteed by the 10th Amendment, Article III and Article VI);

6. Whether the Judgments and Decisions of this Court in *Roe v. Wade* and *Doe v. Bolton* are void as violative of Fundamental

Principles of Personal Jurisdiction (absence of personal jurisdiction both over Unborn Children affected by abortion and those Children who are born alive after abortions but who die as a consequence of abortion, etc.); and

7. Whether the Unborn Children Petitioners are protected against death by abortion by the revival, as a legal effect of *Roe v. Wade* (assuming *Roe* to be a lawful decision), of Texas criminal anti-abortion law of Article VI, "supreme law," status, under the U.S. Constitution, such anti-abortion law having been adopted in the Republic of Texas and having been carried forward into the laws of the State of Texas by the 1845 Annexation Accord between the Republic and the United States.

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OPINION BELOW

The Court of Appeals did not write an opinion.

JURISDICTION

The Judgment of the Court of Appeals denying Petitioners' Motion for Leave To File Petition for Temporary Injunctive Relief was entered on November 5, 1981 (Pet. App. 1). A Motion for Rehearing and Amendment thereto were filed in a timely manner and overruled by the Court of Appeals on November 30, 1981 (Pet. App. 2). The Supreme Court of Texas is without jurisdiction to review such Judgment because it was rendered in an *original proceeding* in the Court of Appeals.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

U.S. CONSTITUTIONAL, TEXAS ANNEXATION ACCORD (INCLUDING RELEVANT LAW FROM THE REPUBLIC OF TEXAS) AND FEDERAL RULE PROVISIONS INVOLVED

These data, which are lengthy, are set forth in the Appendix, pp. 3-13. They are cited as (1) Article III and VI, and the 5th, 9th, 10th and 14th Amendments to the U.S. Constitution; (2) the 1845 Annexation Accord between the Republic of Texas and the United States, which includes (a) Joint Resolution of the U.S. Congress, approved March 1, 1845, 5 U.S. Stat. 797-798, (b) Joint Resolution of the Ninth Congress of the Republic of Texas, approved June 23, 1845, 2 Gam., *Laws of Texas* 1225-1227, (c) Ordinance of the Republic of Texas, approved on July 4, 1845, 2 Gam., *Laws of Texas* 1228-1230, (d) Texas Const. of 1845, Arts. Seventh, Sec. 20, and Thirteenth, Sections 3 and 13, 2 Gam., *Laws of Texas* at 1293-1294, 1299, 1301, (e) Joint Resolution for the Admission of Texas into the Union, approved December 29, 1845, 9 U.S. Stat. 108, and (f) related legal materials from the Republic of Texas, namely, certain statute law of the Republic, 1 Gam., *Laws of Texas* at 1255, 2 Gam., *Laws of Texas*, at 177-178, 306, 308, 342, 299-

[1] See Articles 1728 and 1729, *V.T.C.S.*; *Long v. Martin*, 285 S.W. 1075, 1077 (S.C. Tex., 1926) (original proceeding in Court of Civil Appeals for writ of mandamus); *Quinn v. Halbrook*, 285 S.W. 1079 (S.C. Tex., 1926) (original proceeding in Court of Civil Appeals for writ of prohibition).

300, the Constitution of the Republic of Texas, adopted March 17, 1836, 3 Tex. Const. (Vernon's) (1955), p. 528, and a statute of England relative to the offense of abortion which was adopted in the Republic, namely, 9 Geo. IV, c. 31, § XIII (1828); and (3) Rule 19(a), F.R. Civ. Proc.

STATEMENT OF THE CASE

On October 21, 1981, while their appeal from a Texas District Court Judgment, etc. was pending before the Court of Appeals ("said appeal"), the Petitioners[2] instituted a separate, *original proceeding* in the Court of Appeals under Rule 383, Tex. R. Civ. Proc., to prohibit immediately and temporarily the Respondent from performing or assisting in the performing, at its facilities, of all abortions affecting the Petitioners (maternal life-saving abortions not covered) and any and all experimentation, physical abuse, etc. to any Petitioner Class Child born alive after an abortion. (Petitioners comprise *all* of the Appellants on said appeal, and Respondent is *one* of *nine* Appellees therein.) The injunctions were sought for purposes of preserving the Court's appellate jurisdiction over various aspects of said appeal, and were authorized by Article 1823, *V.T.C.S.*

On November 5, 1981, the Court of Appeals denied, without opinion, Petitioners' Motion for Leave To File their Petition for Temporary Injunctive Relief. On November 30, 1981, the Court overruled, without opinion, Petitioners' Motion for Rehearing and Amendment thereto.

The pertinent facts are these:

1. In 1979, the Petitioners, as Plaintiffs, sued the Respondent (sometimes called "District") and other local Texas governmental units and officials, as Defendants, for declaratory and injunctive relief due to their complained of abortion or abortion-related activi-

[2] Petitioners are Taxpayers and Children affected adversely by abortion. Members of the averred Children Class of Petitioners who are alive after having been aborted ("Abortion Survivors") are U.S. and Texas Citizens. See U.S. Const., 14th Amend., § 1. Under Texas law, a Class consisting partially or wholly of Unborn Children may be represented in judicial proceedings. *Mitchell v. Mitchell*, 244 S.W. 2d 803, 804 (S.C. Tex., 1951); *Bradley v. Hendry*, 239 S.W. 2d 404, 405 (Tex. Civ. App.—Fort Worth, 1951), no writ.

ties. The Petition avers, in part, that abortions affecting adversely members of the Children Class are being performed unlawfully and unconstitutionally at District facilities and with the direct or indirect assistance of all Defendants; that the Abortion "Survivors" so affected are U.S. and Texas Citizens; that the Unborn Children so affected possess legal or juristic personalities under the U.S. Constitution; that the complained of conduct violates rights of the Children under the 9th and 14th Amendments to the U.S. Constitution, under the Supremacy Clause of the U.S. Constitution (because some of their rights derive from U.S. Statutory Law, the 1845 Annexation Accord between the Republic of Texas and the United States and Rule 19, F.R. Civ. Proc., which has the force of a U.S. statute) and under Texas law, as authorized by the Division of Powers of the U.S. Constitution and as guaranteed by the 10th Amendment thereof; that property tax funds paid by the Taxpayers and averred Taxpayer Class are being used unlawfully and unconstitutionally to further such abortion purposes; and that *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), are void as violative of the U.S. Constitution and Fundamental principles of Personal Jurisdiction (Tr. 201-237).[3]

2. After *Roe v. Wade* was decided, the Respondent, through its Board of Hospital Managers ("Board"), adopted certain policies which permit abortions to be performed at its facilities within the guidelines of *Roe* (Tr. 134). Pursuant thereto, abortions and/or abortion procedures "have been, are being and may be performed" at such facilities (*ibid.*). During this period and up to June 9, 1981, Respondent operated an abortion clinic, called the Voluntary Termination of Pregnancy Clinic ("VTP Clinic"), at its Jefferson Davis Hospital ("Hospital"), and the "great majority" of such abortions were performed at the VTP Clinic (*ibid.*).

Respondent is funded primarily by property taxes which are paid by the property taxpayers of Harris County, including Taxpayer

[3] "Tr" refers to the certified Transcript of Record on appeal which is on file in the Court of Appeals. In addition, Petitioners have filed at the appellate stage an Affidavit of "J. Roe" dated August 25, 1981, an Amended Affidavit of "J. Roe" dated September 17, 1981, and an Affidavit of Rebecca P. Schwaneck[illegible], M.D., F.A.A.P., dated September 15, 1981.

Petitioners. Property taxes paid by such Petitioners have been and are being used, directly or indirectly, for abortion purposes at Respondent's facilities (Tr. 135-136; Affidavit of "J. Roe"). Respondent furnishes limited personnel, equipment, supplies, etc. for abortion purposes (*ibid.*).

On May 14 and June 4, 1981, the Harris County Commissioners Court ("Commissioners Court") disapproved Respondent's proposed Operating Budget for Fiscal Year 1981-1982 because it included funds for abortions (Tr. 253, 296, 301). See Art. 4494n, § 8, *V.T.C.S.*, for the budget approval authority of the Commissioners Court. While said Budget specified funding for the VTP Clinic, it did *not* describe or identify funds for abortions and/or abortion procedures in *other* District facilities.

On June 8, 1981, Respondent eliminated, "under protest," the budgeted funding for the VTP Clinic, and requested the District Administration to prepare and submit questions to the Harris County Attorney for use in securing an opinion from the Attorney General of Texas relative to the authority of the Commissioners Court "to delete" the "line item" relating to the VTP Clinic and as to the authority of the Board under Article 4494n, *V.T.C.S.* (Tr. 296, 303).[4] On the following day, the Commissioners Court approved said Budget, as revised, and Respondent closed its VTP Clinic (Tr. 296, 307).

Subsequently, Respondent and the remaining Defendants in the lawsuit moved to dismiss the same because tax monies were no longer used to operate the VTP Clinic, and the District Court, being of the *opinion* that abortions were no longer being performed at District facilities, dismissed the lawsuit as moot (Tr. 287, 375-376).

3. In the meantime, abortions affecting the Petitioners adversely have taken place at said Hospital after the closing of the VTP Clinic and during the pendency of said appeal. Two of these abortions resulted in live births: On July 3, 1981, a Boy, aborted because he was diagnosed as having Downs Syndrome, was taken to a laboratory at said Hospital where "flesh and tissue, about the size of

[4] The record does not disclose whether such an opinion was sought.

quarters, were sliced and removed from his right and left thigh areas (apparently for use as tissue samples for study)," and three needle-size puncture wounds were made to his heart or heart area (Affidavit of "J. Roe"). He was removed from the laboratory alive and bleeding. Mucus was not drained from his nose or throat. He died later that day in an unheated incubator (*ibid.*). Another "Survivor," a Girl, died at said Hospital on September 15, 1981, eight days after her birth (Amended Affidavit of "J. Roe"). In addition, said abortion policies, qualified by the closure of the VTP Clinic, remain in effect.

4. Petitioners' Petition for Temporary Injunctive Relief averred, *inter alia*, that Members of the Children Class were Litigants, that the Abortion "Survivors" were U.S. and Texas Citizens, that the Unborn Children had legal or juristic personalities under Texas and other law, that all such children had substantial legal rights which needed preservation, that affected Unborn Children were being threatened, endangered and/or destroyed by abortion at Respondent's facilities, that the continuance of such complained of conduct constituted "continuous destruction" of the rights of the Taxpayers *not* to support the same as applied to such Children, and that rights once destroyed in such context could never be restored. It averred that the injunctive relief was required in order to preserve parts of the subject matter of said appeal, namely, the rights postures of affected Members of the Children Class and of the Taxpayers and Members of the Taxpayer Class, and to preserve the *status quo* of such parties as affects the Court's appellate jurisdiction over them and their rights postures.

The Petition also averred that *Roe v. Wade* was inapplicable to the proceeding, and that *Roe* could not operate to bar the relief requested because it was absolutely void as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction. Appropriate particulars were supplied to the Court.[5]

5. The record contains scientific evidence that human life begins at conception, which is that point in time when the male sperm cell

[5] These (and other) positions in this Petition for a Writ of Certiorari were preserved in Petitioners' Motion for Rehearing, as amended.

impregnates the female egg cell (Tr. 82). At that time, the "new being" receives half of the chromosomes from each parent and has an "absolutely unique hereditary plan" (*ibid.*). This new life is controlled by an individual genetic code.

> The genes contain an enormous library of information projected from the past on the helix of Desoxyribonucleic acid or "DNA." A single thread of DNA from a human cell contains an utterly fantastic amount of information of unique and individual instructions for the new individual. These instructions are operative over the new being's life and form a continuum of human existence even unto succeeding generations (Tr. 82).

The unborn child is alive, human and has a distinct being (Tr. 83, 86). The "new individual" is *alive* because the characteristics of life, including the "ingestion of food or nutrients, the extraction of energy therefrom, growth, adaption to surroundings and reproduction," exist or are placed in motion at conception (Tr. 83). The unborn child is ***human*** because he or she is "formed by the union of human cells," is the biologic offspring of human parents, deriving half of the genetic makeup from each parent, and, a little later, "has human blood, human tissue, human organs, a human form and human characteristics, and engages in human activities" (Tr. 86). Finally, the unborn child has a separate *being* because he or she "grows and develops as a separate being" (*ibid.*). He or she has separate tissue which "is antigenetically different from that of the mother" (*ibid.*). "Physicians who treat pregnant women for illnesses or medical conditions consider that they have two patients —the mother and her unborn child***" (*ibid.*).

The record also discloses the early development of the unborn child, including (Tr. 84):

> In the first three weeks of the second month after conception, the embryo becomes a well proportioned small-scale human baby. In the seventh week after conception, the unborn child, which is less than an inch in length and weighs about 1/30 of an ounce, (a) has a human face with eyes, ears, nose, lips, tongue, and milk bud teeth in the gums; (b) has a body which is rounded, padded with muscles and covered by a thin skin; (c) has arms with hands, fingers and thumbs; (d)

has legs with recognizable knees, ankles and toes; (e) has a stomach which produces some digestive juices; (f) has a liver which manufactures blood cells; (g) has kidneys which extract some uric acid from the blood; (h) has a heart which is beating sturdily; (i) has a brain which sends out impulses which coordinate the functioning of the other organs and which emits brain waves; and (j) has muscles which can be set in motion. At that time, when the bone cells begin to form, the body is essentially completed and the embryonic period has ended.*** He or she is a little person and can well be called a baby. From that point forward, the baby increases in size and perfection, and develops and refines his or her skills.

Sometimes children are born alive after abortions caused by the administration of saline, prostaglandin or pitocin. In abortions by hysterotomy (caesarean section), the child will be removed alive if alive when the operation begins (Tr. 88). "Children are born or brought forth alive after abortions in Harris County, Texas, and are in need of immediate medical attention***" (Tr. 88).[6]

ARGUMENT

This Court should grant certiorari primarily to determine whether the Court of Appeals, in an *original proceeding* for temporary injunctive relief to preserve appellate jurisdiction in a *related case* on appeal before it, violated the rights of the Petitioners under the 9th and 14th Amendments to the U.S. Constitution when it refused to consider further and to enjoin abortions and any further human experimentation conduct affecting them at the tax-supported facilities of the Respondent, *Roe v. Wade*, 410 U.S. 113 (1973), being inapplicable thereto and being void as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.

In this further connection, the Court should reconsider and overrule *Roe v. Wade*, *supra*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179 (1973) because:

[6] The record discloses various adverse physical, medical and psychological consequences of abortion (Tr. 88-89). Abortion does "natural violence to the normal functioning of the female reproductive system," and is "contrary to human nature and human science and biology" (Tr. 89).

- Important factual and legal matters, presented by this case, were not before this Court in *Roe* and *Doe*;
- *Roe* and *Doe* have brought about legal and other consequences unintended by the Court;
- *Roe* and *Doe* violated the U.S. Constitution in a number of particulars and, hence, they are void;
- *Roe* and *Doe* violated or permitted to be violated fundamental principles of personal jurisdiction (relative to Unborn Children and U.S. Citizen Children who have "survived" abortions only to die) and, hence, they are void; and
- *Roe*, if a lawful decision, operated to revive, as law in Texas, the prior Texas anti-abortion law, which law is of U.S. Constitutional (Art. VI) status because carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord between the Republic and the United States, and such revived law protects unborn children in Texas from death by abortion.

Since *Roe* and *Doe* are constitutional type decisions, with broad-based impacts, this Court should be sensitive to calls for re-examination under appropriate circumstances. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Dissenting Opinion of Mr. Justice Brandeis). For a classic example where the Court has overruled an unconstitutional decision by it, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842).

I.

The Court of Appeals Violated the Rights of the Petitioners Under the Due Process Clause of the 14th Amendment, U.S. Constitution

The Court of Appeals deprived the Petitioners of their rights to life, liberty and property without due process of law, in violation of the 14th Amendment, U.S. Constitution,[7] when it denied their Motion for Leave To File a Petition for Temporary Injunctive Relief and when it refused to consider further their claims and to grant the

[7] Life, liberty and property for the affected Children; liberty and property for the affected Taxpayers and Taxpayer Class.

injunctive relief sought. The Record, Affidavits and verified Petition for Temporary Injunctive Relief showed clearly that part of the *jurisdiction* of the Court of Appeals over the related appeal was being jeopardized and destroyed by abortion, and that such jurisdiction was in need of preservation. Some of the affected Children (together with all of their legal rights) were being threatened, endangered and/or destroyed by abortion at Respondent's facilities—those of a political subdivision of the State of Texas—and all of the rights of the Taxpayer and Taxpayer Class Petitioners *not* to support such abortion conduct were being threatened, endangered and/or destroyed *as to such affected Children*. The *status quo* of such parties in relation to the Court's jurisdiction was being threatened, endangered and/or destroyed by abortion at such facilities. Further, such abortion conduct ran counter to the *spirit* of the Commissioner's Court's budgeting disapproval action, above.

The Court of Appeals, of course, is subject to the requirements of the due process clause of the 14th Amendment since "the action of the States to which the Amendment has reference includes action of state courts and state judicial officials." *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948). Further, it has a duty to do what it can to preserve its own jurisdiction, with ample statutory and procedural authority to do so. Art. 1823, *V.T.C.S.*; Rule 383, Tex. R. Civ. Proc. In fact, Rule 383 was *liberalized*, effective January 1, 1981, to make the test for the granting of a motion for leave to file *easy* to meet—from one where the court was "clearly of the opinion" to one where the court is simply of the "tentative opinion" of relief entitlement.

The rights of the Petitioners (individuals and Class Members) were before the Court on said appeal, and, with the endangerment and/or destruction of such rights, the Court's appellate jurisdiction was being eroded before its *very eyes*. Other Texas Courts have demonstrated a clear willingness to protect appellate subject matter by temporary injunction in *nonabortion cases* [*Carpenter v. Hausman*, 601 S.W. 2d 88, 90 (Tex. Civ. App.—San Antonio, 1980), no writ; *Pendleton Green Associates v. Anchor Savings Bank*, 520 S.W. 2d 579, 582 (Tex. Civ. App.—Corpus Christi, 1975), no writ; *Riverdrive Mall Inc. v. Larwin Mortgage Investors*, 515 S.W.

2d 2, 4 (Tex. Civ. App.—San Antonio, 1974), err. ref. n.r.e.]. There is no lawful basis to discriminate against the Petitioners simply because they were seeking relief in an abortion context. Basic civil rights are involved, and the protective reach of Art. 1823, *V.T.C.S.*, is broad. See *Houtchens v. Mercer*, 27 S.W. 2d 795, 796 (S.C. Tex., 1930).

Petitioners are within the protective reach of the due process clause of said 14th Amendment. The Taxpayer and Abortion "Survivor" Petitioners (individuals and Class Members) are "persons" thereunder. So too are Unborn Children. "Personhood" under the 14th Amendment as to them is established (1) under the biological criteria of *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), as applied to the *record facts* of this case, (2) expressly under English, Texas, other law in the United States, (3) impliedly under such law, and (4) by meeting, per such facts, the human personhood tests which this Court established in *Levy v. Louisiana*, 391 U.S. 68 (1968), and applied to a *posthumous child* in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). These bases of personhood are described in further detail, *infra*, pp. 17-20.

Roe v. Wade could not operate to bar the relief requested because *Roe* is inapplicable to the instant case for several reasons: (1) *Roe* has nothing to do with the granting of protective relief to preserve appellate jurisdiction; (2) *Roe* does not apply to justify abortion conduct by the State of Texas since such conduct is contrary to the strong and legitimate interest of the State in "encouraging childbirth" [*Beal v. Doe*, 432 U.S. 438, 445-446 (1977)], conflicts with the great object of state government of protecting human life (U.S. Declaration of Independence, July 4, 1776),[8] and runs counter to the substantial legal rights posture of an unborn child under the State's *very own law*; and (3) *Roe* could not apply to the Children Class Petitioners because they are unique, individual human beings who were not in existence when *Roe* was decided in 1973. In *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975), this Court

[8] "***[I]t is *always safe* to read the *letter* of the Constitution in the *spirit* of the Declaration of Independence." *Gulf, Colo. and Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 160 (1887).

cautioned against applying *Roe* to situations which were not before or decided by the Court in *Roe*. This Court has *never* passed upon the lawfulness of abortional killing by state or local government.

Moreover, *Roe* could not operate to bar the relief requested because it is *absolutely void* as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction. See *infra*, pp. 24-28.

II.
The Court of Appeals Violated the Rights of the Petitioners Under the 9th Amendment, U.S. Constitution

The 9th Amendment to the U.S. Constitution includes two fundamental rights which were involved in the original proceeding before the Court of Appeals, namely, the Right to Life and the right to effective resort to the judiciary. These are axiomatic. The Taxpayers and Abortion "Survivor" Petitioners are "people" who are included within the coverage of the 9th Amendment. So are the Unborn Children Petitioners who have well recognized legal or juristic personalities and rights postures under English, Texas, other States and United States law. E.g., *Wallis v. Hodson*, 27 E. Repts. 642, 643, 644 (Ch., 1740) (unborn child as "person in rerum natura"); *Guilliams v. Koonsman*, 279 S.W. 2d 579, 581 (S.C. Tex., 1955) (unborn child as "in esse" for purposes of taking under a will); *Barker v. Pearce*, 30 Pa. 173, 175 (S.C. Pa., 1858) (unborn child as a "child left" at the time of the father's death); *Adams v. Weinberger*, 521 F. 2d 656, 660-661 (C.A. 2, 1975) (unborn child as a recipient of "support" from his father within the meaning of the Social Security Act).

In this further regard, when the 9th Amendment was adopted in 1791, the legal status and rights posture of the unborn child was well recognized under English law, as adopted or received by the States of this Nation. I Swift, *A System of Laws of the State of Connecticut* (1795), pp. 177, 178, 281; I Blackstone, *Commentaries on the Laws of England*, pp. 129-130. This included the right to be protected against death by abortion. I Swift, *op. cit.*, p. 178; II Swift, *op. cit.* (1796), p. 299. At that time, there were three well recognized offenses relating to abortion at common law:

- *Murder*, if the mother died as a result of an abortion [*Margaret Tinkler's Case* (1781), I East, *A Treatise of the Pleas of*

the Crown (Phil., 1806), 230, 354-356];

- *Murder*, if the abortion resulted in the live birth of a child who afterwards died as a result of the abortion [See, e.g., *Sim's Case*, 75 E. Repts. 1075 (Q.B., 1601)]; and
- *Heinous Misdemeanor, etc.*, if a live child was killed within the mother [See, e.g., I Blackstone, *op. cit.*, pp. 129-130.].

The Life Right of the unborn child was complemented by the execution reprieve rule applicable to a woman "with child" or "quick with child." E.g., Cowell, *The Institutes of the Lawes of England* (1751), p. 273. In *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), this Court pointed out that "[t]he writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law in order to guard against the *taking of the life of an unborn child for the crime of the mother*" (141 U.S. at 253). (Emphasis added.)

Moreover, the fact that unborn children have substantial other rights, vested and contingent, under English and American law fortifies their position under the 9th Amendment [e.g., *Lutterel's Case* (circa 1660), referred to in *Hale v. Hale*, 24 E. Repts. 25, 26 (Ch., 1692) (bill brought on behalf of an unborn child and an injunction granted to stay waste of the child's property interests.)]. As this Court declared not long ago, "Property does not have rights. *People have rights.*" *Lynch v. H.F.C.*, 405 U.S. 538, 552 (1972). (Emphasis added.)

The Court of Appeals had before it a situation involving the Life Rights (and other rights) of Children Class Petitioners and the right to effective resort to the judiciary for the preservation of rights of all Petitioners. As shown above, such Life Rights were in clear jeopardy. Under the 9th Amendment, all Petitioners were entitled to look to the judiciary to preserve their rights involved in the litigation, especially where *other* Texas courts have shown a clear willingness to preserve appellate jurisdiction under Article 1823, *V.T.C.S.*, in contexts *other* than abortion. The Court, in effect, closed its doors to all of the Petitioners. For the reasons expressed herein, *Roe v. Wade* was inapplicable to this proceeding and, in any event, is void as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.

III.
Important Factual and Legal Matters Were Not Before This Court in Roe and Doe

A. *Commencement of Human Life*. In *Roe*, this Court said that it would not decide the "difficult question" of when human life begins (410 U.S. at 159). Small wonder, since the *record* before the Roe Court was *silent* on this subject. In the instant case, however, there is uncontradicted scientific evidence in the record that human life begins at conception (Tr. 82). This life is "human" at conception since it is formed by the union of *human* cells, contains the *human* genetic code, and is the biologic offspring of *human* parents (Tr. 86). Had this type of evidence been before the *Roe* Court, it is *unlikely* that the Court would have characterized an unborn child as "potential life" or the "potentiality of life." This would have presented an *altogether different* question to the Court, i.e., whether the State of Texas had a sufficient interest in protecting the *actual* lives of unborn children in the State from death by abortion.

B. *Essential Characteristics of Unborn Human Life*. The *record* before the *Roe* Court was *devoid* of essential scientific evidence on the characteristics of unborn human life. Therefore, there was *nothing* in the record on which to apply this Court's human "personhood" standards laid down in *Levy v. Louisiana*, supra, 391 U.S. 68, or the "biological" test of "personhood" expressed generally in *Glona v. Am. Guarantee & Liab. Ins. Co., supra*, 391 U.S. 73.

In the instant case, the record shows that the unborn child is human, alive and has a distinct being or entityship (Tr. 83, 86). As such, the unborn child meets squarely the (1) "live human being" test of human "personhood" formulated in *Levy* and applied to a *posthumous child* in *Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S. 164, and the (2) "biological" basis of human personhood expressed in *Glona*.

In addition, the record in the instant case shows that, at about 7 weeks of gestation, the unborn child "has a human face with eyes, ears, nose, lips, tongue, and milk bud teeth in the gums;" has a body, with arms, legs, hands, fingers, ankles and toes; "has muscles which can be set in motion;" and possesses a stomach "which produces some digestive juices," a liver "which manufac-

tures blood cells," kidneys "which extract some uric acid from the blood," a heart "which is beating sturdily," and a brain "which sends out impulses which coordinate the functioning of the other organs and which emits brain waves" (Tr. 84). In short, such a child clearly is "one of us."[9]

C. *Revival of Texas Anti-Abortion Law as a Legal Effect of Roe v. Wade*. In *Roe v. Wade*, the Court held unconstitutional certain Texas anti-abortion statutory law first enacted in 1854. Assuming, without admitting, *Roe* to be a lawful decision, its legal effect operated to revive, under the doctrine of revival,[10] the *prior* anti-abortion law of Texas, which prior law is of Article VI status because carried forward from the laws of the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord.

The Court never had a chance to consider this subject because, during the second oral argument in the case, Counsel for Henry Wade indicated to the Court that Texas had not legislated on the subject of abortion before 1854, and that, prior to 1854, it was legal to abort in the State (Tr. Oral Arg., *Roe v. Wade*, October 11, 1972, pp. 67-68)! However, the Republic of Texas adopted the English Common Law as the "rule of decision" for application "in all criminal cases" (Const. Rep. of Tex., 1836, Art. IV, § 13) and, by statute in 1836, provided that "all offenses known to the common law of England," as then understood and practiced, which were not provided for in that statute (and abortion was not provided for therein), were to be "punished in the same manner as

[9] In addition, evidence of the deleterious physical effect of induced abortion on the female reproductive function was not, of course, before the Court in *Roe*. This evidence—e.g., higher incidences of low-birth-weight infants, of premature births, of sterility, of spontaneous abortion—is beginning to show up (See Tr. 88-89). In *H.L. v. Matheson*, 101 S. Ct. 1164 (1981), this Court declared that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting***." 101 S. Ct. at 1172.

[10] E.g., *People ex rel Farrington v. Mensching*, 79 N.E. 884, 889-890 (Ct. App. N.Y. 1907); *Harrison v. State*, 527 S.W. 2d 745, 748 (Crim. App. Tenn., 1975), *cert. denied*, see 527 S.W. 2d 745; *Goines v. Rockefeller*, 338 F. Supp. 1189, 1195 S.D. W. Va., 1972); 16 *C.J.S.*, "Constitutional Law," § 101, pp. 469, 473. See *Patapsco Guano Co. v. N.C. Bd. of Agriculture*, 171 U.S. 345, 353 (1898); *Kohlsaat v. Murphy*, 96 U.S. 153 (1878).

known to the said common law" (Act Punishing Crimes and Misdemeanors, Sec. 54, approved December 21, 1836, 1 Gam. *Laws of Texas* 1247, 1255). Thus, the English criminal law of abortion was adopted as law in the Republic in 1836.

These criminal law provisions formed part of the laws of the Republic which were carried forward into the law of the State of Texas by the 1845 Accord (Tex. Const. of 1845, Art. Thirteenth, § 3, see *id.*, § 13). After Statehood, the Supreme Court of Texas declared that "[t]he common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic, *and is still the law.*" *Grinder v. The State*, 2 Tex. 339, 340 (S.C. Tex., Dec. Term, 1847). (Emphasis added.)

Hence, the Texas anti-abortion law in existence *prior* to 1854 [9 Geo. IV, c. 31, § XIII (1828) (App., pp. 4-5) and/or the English Common Law crimes dealing with abortion (*supra*, pp. 11-12)] is of Article VI status by virtue of the 1845 Accord between the Republic and the United States. This Accord is fully executed and cannot be changed. Only the Texas Legislature has the authority to change the laws of the Republic which were carried forward into Texas Statehood. In *United States v. Louisiana*, 363 U.S. 1, 37-38 (1960), this Court, in a different context, recognized this feature of Texas' annexation.

D. *Failure of This Court to Understand the Common Law Offense of Abortion*. After brief review of the English Common Law relative to abortion (410 U.S. at 132-136), the Court concluded that the reliance by American Courts on Coke concerning abortion was "uncritical and, apparently by all the reported cases, dictum," and that this made it "appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus" (410 U.S. at 136). This was a most unfortunate historical-legal mistake because it (1) *emasculated* the effect of the reception or adoption of the English Common Law in the 13 Original Colonies and the States of the United States *relative* to the *Common Law crimes concerning abortion*, (2) led to a *misunderstanding* of the *purposes* underlying the anti-abortion statutes of the States, and (3) *emasculated* the significance of the *rights* of

an unborn child under the Common (and other) Law, *especially* as such rights related to constitutional "personhood."

The short of the matter is that abortion was an offense or a legally cognizable wrong from early common law times to the enactment of the first English anti-abortion statute in 1803;[11] that the numerous rights on an unborn child, vested and contingent, at Common Law and in this country were furthered because of such life protection, thereby enhancing the "personhood" or legal status of the unborn child under the U.S. Constitution; that, at the time the 5th and 9th Amendments were adopted, the 13 Original States, with their reception of the English Common Law, recognized abortion as an offense; that abortion was recognized and prosecuted as a common law crime in the States prior to the enactment of criminal statutes on the subject;[12] that the common law crime of abortion was recognized in some States *after* enactment of their anti-abortion statutes;[13] that, at the time the 14th Amendment was adopted, the unborn child enjoyed substantial

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[11] The earliest reported abortion case in post-conquest England was in the year 1200. Other early cases appeared in the years 1202, 1203, 1206 and 1221. E.g., *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887). Case Nos. 82 (1200), 26 (1202) and 73 (1203), pp. 39, 11 and 32, respectively. The four editions of *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544), in the parts on indictments, contain an indictment for manslaughter of an unborn child. An interesting conviction for abortion occurred in the Court of Star Chamber during the reign of Elizabeth I. *Star Chamber Cases* (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-20. Abortion remained an offense up to the enactment of Lord Ellenborough's Act in 1803, where abortion was first made a statutory offense in England.. See III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801.

[12] *Commonwealth v. Bangs*, 9 Mass. 386 (S.J.C., Mass., O.T., 1812); *Mills v. Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 82 N.C. 566 and 83 N.C. 544 (S.C.N.C., 1880); *Commonwealth v. Parker*, 50 Mass. 263 (S.J.C. Mass., March Term, 1845); *Commonwealth v. Demain*, 6 Pa. L.J. 28, 31 (S.C. Pa., 1846). See *State v. Murphy*, 27 N.J.L. 112, 114 (S.C.N.J., 1858).

[13] *People v. Jackson*, 3 Hill 92, 94 (S.C.N.Y., May Term, 1842); *State v. Reed*, 45 Ark. 333, 334 (S.C. Ark., 1883). In several of the States, abortion was viewed as a Common Law offense at *all* stages of gestation. *Mills, supra*, 13 Pa. St. at 632; *Slagle, supra*, 83 N.C. at 545; *Reed, supra*, 45 Ark. at 334; *Munk v. Frink*, 116 N.W. 525, 527 (S.C. Neb., 1908); *Commonwealth v. Reid*, 8 Phil. Repts. 385, 399-400 (Court of Oyer and Terminer, 1871).

life protection by state statutory or common law anti-abortion provisions; and that the purposes behind the anti-abortion statutes enacted by the States, which complemented such Common Law life protections, were designed to protect either the unborn child or the unborn child and the mother.[14] Had the court understood these matters, it would not have denied 14th Amendment "personhood" to the unborn child.

E. *The Constitutional "Personhood" of the Unborn Child.* The Court, in *Roe*, approached the constitutional "personhood" of the unborn child basically from the standpoints of the interest of the State of Texas in affording protection and of the wording of the Constitution as to use of the term "person." The Court, however, should have considered the following:

1. *Biologic Personhood.* As shown by the Statement of the Case, *supra*, human life commences at conception; and this life is both human and biologically distinct from the mother's life. Physical formation occurs quite rapidly. Petitioners submit respectfully that this Court simply *cannot* ignore uncontradicted scientific evidence on this score. The unborn child clearly is not "potential life" or the "potentiality of life." He or she *is* a live, human being.

One hundred and fifty years ago, and earlier, when much stock was placed on *movement* or the *ability to move* by the unborn child as determinative of "life," a "potential life" characterization might have fit an unborn child who was *not* able to stir in the

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[14] *State v. Howard*, 32 Vt. 380, 399 (S.C. Vt., 1859); *Dougherty v. People*, 1 Colo. 514, 523 (S.C. Colo., Feb. Term, 1872); *Edwards v. State*, 112 N.W. 611, 613 (S.C. Neb., 1907); *State v. Miller*, 133 P. 878, 879 (S.C. Kan., 1913); *State v. Tippie*, 105 N.E. 75, 77 (S.C. Ohio, 1913); *State v. Ausplund*, 167 P. 1019, 1022 (S.C. Ore., 1917); *Nash v. Meyer*, 31 P. 2d 273, 276 (S.C. Idaho, 1934); *Bolan v. Lunsford*, 54 P. 2d 666, 668 (S.C. Okla., 1936); *State v. Cox*, 84 P. 2d 357, 361 (S.C. Wash., 1938). And from mid-twentieth century forward, this view of statutory purpose persisted. E.g., *State v. Siciliano*, 121 A. 2d 490, 495 (S.C.N.J., 1956); *Anderson v. Commonwealth*, 58 E. 2d 72, 76 (S.C. of App. Va., 1950). In *State v. Murphy*, *supra*, 27 N.J.L. 112, on which this Court relied as an example to show a different purpose, the state court said that the unborn child was protected by the Common Law, that the mother was liable thereunder, and that the purpose of the statute under consideration was to cure a defect in the Common Law which that court discussed earlier in *State v. Cooper*, 22 N.J.L. 52 (S.C.N.J., 1849).

womb. While the view of the law then may have squared with the primitive science and biology of the times, late 20th century jurisprudence does *not* have such an excuse. Indeed, *Roe*, in this regard, is even *more primitive* than the Common Law of Blackstone's time, for Blackstone wrote that a natural "person" had the absolute right of personal security (life), and that "life" commenced when an infant "was able to stir in the mother's womb" (1 Blackstone, *Commentaries on the Laws of England*, p. 129). *Roe* ascribes but "potential life" in the child up to birth!

The Court should note that the mammalian ovum was discovered in 1827 and, with that, the understanding of human fertilization. Shortly thereafter, a medical work mentioned the human ovum in connection with a discussion of the human embryonic period, stated that "the foetus is alive from the very moment of conception" and said that "abortion is the destruction of a human being***." Ryan, *A Manual of Medical Jurisprudence* (Phil., 1832), pp. 127, 128, 131. In addition, it is interesting to note that, in but ten years after the discovery of the ovum, the English anti-abortion law of 1828 was replaced with a statutory provision which made abortion a felony *without regard* to whether the woman was "quick with child" [7 Wm. IV and 1 Vict., c. 85 (1837)].

2. *Personhood—Express Recognition*. The legal status or legal personality of an unborn child has been recognized expressly under English law [e.g., *Doe v. Clarke*, 126 E. Repts. 617, 618 (K.B., 1795)], Texas law [e.g., *Nelson v. Galveston, H. & S.A. Ry. Co.*, 14 S.W. 1021, 1023 (Com. App. Tex., 1890), *opinion adopted*, 14 S.W. at 1024 (S.C. Tex.)], other states' law [e.g., *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257-258 (S.J. Ct. Mass., March Term, 1834)] and United States law [e.g., *Wagner v. Finch*, 413 F. 2d 267, 268-269 (C.A. 5, 1969)].

3. *Personhood—Implied Recognition*. The legal status or legal personality of an unborn child is recognized impliedly by virtue of the fact that the unborn child possesses a rich bundle of legally cognizable rights—vested and contingent—under tort, property and other law. These rights are enhanced because of the life protection rights, above. For example, in Texas, an unborn child has the right to be represented in judicial proceedings which affect the child

[e.g., *Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ], a situation which obtained at Common Law [Lutterel's Case, *supra*, see 24 E. Repts. at 26]; is "in esse" for purposes of taking under a will (*Guilliams v. Koonsman*, *supra*, 279 S.W. 2d at 581); and is owed a duty of care, at any stage of gestation, under the prenatal tort injury doctrine [*Delgado v. Yandell*, 468 S.W. 2d 475 (Tex. Civ. App.—Fort Worth, 1971), err. ref. n.r.e., *holding approved*, 471 S.W. 2d 569 (S.C. Tex., 1971)]. Numerous rights of unborn children derive from the Common or statutory law adopted by the Republic of Texas (e.g., representation, inheritance, taking under a will) and are of Article VI status because carried forward into Texas State law from the laws of the Republic by virtue of the 1845 Annexation Accord. See Tex. Const. of 1845, Art. Seventh, Sec. 20, and Art. Thirteenth, Sec. 3. Moreover, numerous types of rights and interests are recognized in, or conferred upon, unborn children under U.S. statutory law (e.g., the Social Security Act), discussed *infra*. These rights bespeak personhood or legal status, for as this Court put it, "Property does not have rights. People have rights." *Lynch v. H.F.C.*, *supra*, 405 U.S. at 552. Or, as a work of noted authority has it, "Persons are the subject of rights and duties***. A person is such, not because he is human, but because rights and duties are ascribed to him." 3 Bouv., *L.D.* (3rd rev., 1914), p. 2575.

4. *Personhood—Standards of this Court*. Except for *Dred Scott v. Sandford*, 60 U.S. 393 (1857), where this Court turned its collective back on members of the Black Race, this Court has applied legal status broadly and humanely up to *Roe v. Wade*. For example, a corporation, which is but an artificial or legal being, is a "person" entitled to the protection under the equal protection and due process clauses of the Constitution.

As for natural persons, this Court has made it clear that science or biology is the test for application. Thus, the "live, human being" test was expressed in *Levy*, *supra*, 391 U.S. at 70; and in *Glona*, *supra*, 391 U.S. 73, the Court said that the "biological," not the "legal," test was controlling on 14th Amendment personhood.

As shown above, the unborn child clearly is alive, human and

has a distinct being. Biologically, the child is one of us. Hence, this Court's tests of personhood under the 14th Amendment, expressed above, clearly are met for the unborn child.

Moreover, the substantial legal rights posture of an unborn child under Texas and other law, above, equates to constitutional personhood or status. Surely a nonentity, or that which is denied recognition by the law, cannot have "rights." See *Lynch*, *supra*, 405 U.S. at 552. Yet unborn children have substantial legally cognizable rights, vested and contingent. See *infra*, pp. 21, 23. Almost a century ago, this Court recognized that unborn children affected by a judicial proceeding were entitled to be represented, and, if they were not, the decree thus entered did not conclude their rights. *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885). State Courts have come to similar conclusions. *Botsford v. O'Conner*, 57 Ill. 72, 76-77 (S.C. Ill., Sept. Term, 1870); *Massie v. Hiatt's Admr.*, 82 Ky. Repts. 314, 319 (Ct. App. Ky., 1884); *Deal v. Sexton*, 56 S.E. 691, 692 (S.C.N.C., 1907).

Roe's examination of the U.S. Constitution for prenatal personhood application was most unrealistic. Aliens (including illegal aliens in this country) are not mentioned, nor are corporations; yet they are "persons."[15] The Preamble to the Constitution speaks, in part, to the "posterity" of this Nation, and the Constitution was preceded by the Declaration of Independence which recognized clearly that man was endowed with the unalienable right of life at creation, not birth. The Court should have focused on the child's legal posture, including legal rights and abortional protection, under English, Texas and U.S. law, and on its own personhood standards and applications.

F. *Constitutional Rights of Unborn Children*. Unborn Children in Texas (and in other States) have a rich variety of rights to life, liberty and property under the U.S. Constitution. These rights include the life right under the due process clauses of the 5th and 14th Amendments; and the life right, directly or as beneficiaries of life protections from the "people" or the States, under the 9th

[15] This Court has "personified" a vessel, and permits certain types of suits to be brought (or defended) in the names of vessels. See *Sierra Club v. Morton*, 405 U.S. 727, fn. 2 at 742 (1972), and cases cited therein (Douglas, J., Dissenting Opinion).

Amendment. At the time these Amendments were adopted, unborn children were protected against death by abortion under the English Common Law and/or State or Territorial statutory law. See, e.g., Dissenting Opinion of Justice Rehnquist in *Roe*, 410 U.S. 171; 1 Swift, *op. cit.*, p. 178.

In Texas, the life right, together with a wide bundle of rights under adopted English law (e.g., representation, inheritance, taking under a will, execution reprieve, etc.) are of Article VI status because carried forward into the laws of the State of Texas by the 1845 Annexation Accord. Rights of unborn children under federal statutory law and the right to be heard as an indispensable party under Rule 19, F.R. Civ. P., which has the force of a U.S. statute, are also of Article VI status.

In addition, the rights of unborn children under *other* Texas law are of constitutional status under the reserved constitutional authority of the State as guaranteed by the 10th Amendment. This Court has recognized that the States have the authority to legislate, etc. on domestic or family matters and the authority to control the devolution and ownership of property at death. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 580-582 (1956); *Labine v. Vincent*, 401 U.S. 532, 538-539 (1971).

G. *The Constitutional Rights of the Affected Children Were Not Pressed to the Court in Roe*. Henry Wade did not represent the affected children—U.S. Citizen Abortion "Survivor" Children or Unborn Children—because he did not undertake to do so,[16] nor was he appointed guardian for them. "Parens patriae" authority in this country for those *non sui juris* is considered to reside in the "people" of a state or the state legislature or, where litigation is involved as to them, in the *equity court* itself. E.g., *Helton v. Crawley*, 41 N.W. 2d 60, 70-71 (S.C. Iowa, 1950); *Arnold v. Arnold*, 18 So. 2d 730, 734 (S.C. Ala., 1944). This harkens back to early English law, where such authority reposed in the King, and which was transferred later to his Chancellor. In *Roe*, Mr. Wade represented an executive or prosecutorial arm of the government.

[16] "Who is speaking for these children? Where is counsel for these unborn children whose life is about to be taken?" (sic) (Tr. of Oral Arg., *Roe v. Wade*, Oct. 11, 1972, p. 64).

The State of Texas was not even a party. As to this, Mrs. Sarah Weddington, an Attorney for Jane Roe, remarked to the District Court, "We goofed" (Record, *Roe v. Wade*, p. 109).

IV.

Roe and Doe Have Produced Various Unintended Consequences

A. *Absoluteness of the Abortional "Right."* In *Roe*, this Court made it clear that a pregnant woman did not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). Nor does the Constitution require "abortion on demand" (Burger, C.J., Concurring Opinion, 410 U.S. at 208). The opposite, as the Court may well take note, has occurred and continues. Well over one million unborn children, together with abortion "survivor" children, are killed by abortion in this Nation each year. The ultimate in Savagery, in the trappings of "liberty," stalks now our Beloved Land. In Texas, killing by abortion is "wide open" from conception to the commencement of childbirth. Even where a state proscribes abortion at and after viability except where the mother's life or health is involved, the "health" meaning, expressed in *Doe v. Bolton*, is so broad as to make such proscription more form than substance.

B. *Effect of the Roe "Ethic" on U.S. Citizen Babies. Roe* and *Doe*, and the "ethic" which they have fostered, kill more than unborn children in this country. They kill or result in the death of U.S. Citizen Babies who "survive" abortion only to die in relatively short order. These children die primarily as a result of prematurity, abortional injury or lack of care. In this connection, the record shows that an Abortion "Survivor" *was murdered* at Respondent's Hospital on July 3, 1981, another "Survivor" died on September 15, 1981, eight days after her birth at said Hospital, and another "Survivor" lived for about 3 days after his mother, allegedly during childbirth, was prescribed and took an abortifacient drug (Affidavit and Amended Affidavit of "J. Roe;" Tr. 128-131). See also, Tr. 90-92, where an Infant Girl died after having been placed in a cold histology room and later in a storage area at a public hospital in Amarillo, Texas. Moreover, since "unsuccess-

ful" abortions (i.e., those resulting in live births) could lead to civil liability for the abortionists, etc., "success" is encouraged legally—to the naked detriment of Infant U.S. Citizens. See *The Ladies Center of Clearwater, Inc. v. Reno*, 341 So. 2d 543 (Fla. App. 2d, 1977).

C. *Internal Legal Chaos*. *Roe* and *Doe* have introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to the unborn child. Under Texas law, for example, an unborn child can take a wrongful death award relative to his deceased father (*Brantley v. Boone, supra*, 34 S.W. 2d 409). Twelve States have ruled or re-ruled since *Roe v. Wade* that a stillborn child who had reached the viability stage is a "person," etc. under their respective wrongful death or kindred statutes, and Rhode Island has ruled similarly *regardless* of the gestational age of the child.[17] An unborn child can take a vested interest in a trust. *Gay v. Baker*, 58 N.C. 344, 345, 346 (S.C.N.C., 1860). "A devise to [an] unborn child of a testator vests the fee to the land in such unborn child subject to being divested if not born alive, but if so born alive the fee becomes absolute." *Tomlin v. Laws*, 134 N.E. 24, 25 (S.C. Ill., 1922). A remainder interest in real property may vest in an unborn child. *Crisfield v. Storr*, 36 Md. 129, 145-146 (Ct. App. Md., 1872). How can the "law" recognize a legal status and provide for or recognize legal rights in an unborn child when *Roe* and *Doe* purport to deny a legal existence to such a child? The states have clear reserved constitutional authority to operate in this sphere. See, e.g., *Labine v. Vincent, supra*, 410 U.S. at 538-539.

[17] *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 358 (S.C. Ala., 1974) ("person" or "minor child"); *Chrisafogeorgis v. Brandenburg*, 304 N.E. 2d 88, 92 (S.C. Ill., 1973) ("person"); *Cox v. Cooper*, 510 S.W. 2d 530 (Ct. App. Ky., 1974) ("person"); *Mone v. Greyhound Lines, Inc.*, 331 N.E. 2d 916, 920 (S.J. Ct. Mass., 1975) ("person") (overruling prior decision); *Pherson v. Kistner*, 222 N.W. 2d 334, 336 (S.C. Minn., 1974) ("decedent"); *Rainey v. Horn*, 72 So. 2d 434, 439-440 (S.C. Miss., 1974) ("person"); *Evans v. Olson*, 550 P. 2d 924, 928 (S.C. Ok., 1976) ("person") (overruling prior decision); *Libbee v. Permanente Clinic*, 518 P. 2d 636, 639 (S.C. Ore., 1974) ("person"); *Presley v. Newport Hospital*, 365 A. 2d 748, 754 (S.C.R.I., 1976) ("person"); *Vaillancourt v. Med. Center Hosp. of Vt.*, 425 A. 2d 92, 94 (S.C. Vt., 1980) ("person"); *Moen v. Hanson*, 537 P. 2d 266, 267 (S.C. Wash., en banc, 1975) ("minor child"); and *Danos v. St. Pierre*, 50 L.W. 2054 (S.C. La., 1981) ("person").

V.

Roe v. Wade and Doe v. Bolton are Unconstitutional

It is, of course, well established that if a court in the United States violates the U.S. Constitution, it loses jurisdiction to proceed to judgment, and any "judgment" which it might render would be void. E.g., *Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh*, 93 U.S. 274, 277-284 (1876). This Court, of course, is capable of violating the U.S. Constitution in its functioning, and in *Erie R. v. Tompkins*, 304 U.S. 64 (1938), admitted that it had done so with its decision in *Swift v. Tyson*, 16 Pet. 1 (1842). 304 U.S. at 77-78, 79-80. *Roe* and *Doe* are void as violative of numerous provisions of the U.S. Constitution:

A. *Violation of the Due Process Clause of the Fifth Amendment.*

1. *No Representation.* Neither Abortion "Survivors" nor abortion-endangered Unborn Children were represented before the Federal District Courts and this Court in *Roe* and *Doe* (except that unborn children were represented before the District Court for a 10-day period in *Doe*). Yet each category of Children was affected vitally by such proceedings. The "Survivors" are U.S. Citizens who were formerly Unborn Children intended for death by abortion. These Citizens were entitled *clearly* to be represented in the *very proceedings* which spelled death to them. Unborn Children who, as shown above, have well defined legal statuses and substantial legally cognizable rights, vested and contingent, were also entitled to be represented in the proceedings which authorized their destruction. See, e.g., *McArthur v. Scott*, *supra*, 113 U.S. at 404; *Brantley v. Boone*, *supra*, 34 S.W. 2d at 411; *Deal v. Sexton*, *supra*, 56 S.E. at 692; *Massie v. Hiatt's Admr.*, 82 *Ky.* Repts. at 319; Macpherson, *A Treatise on the Law Relating to Infants* (Phil., 1843), pp. 235, 355; *Lutterel's Case*, *supra*, see 24 E. Repts. at 26.

2. *No Jurisdiction Over the Person.* Since Abortion "Survivors" and Unborn Children were *not* before the District Courts in *Roe* and *Doe* (except as noted above in the *Doe* Court), yet were affected by those proceedings in the most *personal* way possible, the Judgments and Decisions of those Courts were *void* as to them, and, being void, they infected with *corresponding voidness* the re-

view proceedings in this Court. See *Pennoyer v. Neff*, 95 U.S. 714, 728 (1878); Rule 19, *supra*.

3. *Invidious Discrimination—Abortion "Survivor" v. Nonaborted Born Child.* By permitting the Abortion "Survivor" to be brought forth in a context where death is *almost always* a certainty, this Court discriminated invidiously against him or her compared to the Nonaborted Born Child. Each such child is a U.S. Citizen, and each is entitled clearly to continue to live. One, however, has a full chance, while the other practically no chance. The "Survivor," for the most part, either *cannot* live or is *not permitted* to live.

4. *Invidious Discrimination—Unborn Child v. Nonaborted Born Child.* By permitting the destruction of the Unborn Child, this Court has discriminated invidiously against such Child compared to a Nonaborted Born Child. Each has a legal status, and each has legally cognizable rights. A prematurely-born *7-month* "wanted" Child has constitutional protections while an *8-month* Unborn Child is stripped of his or her legal rights and protections. The discrimination is palpably invidious.

5. *Invidious Discrimination—Unborn Child v. a Corporation.* An *artificial* being, not mentioned in the Constitution, is recognized and has due process (and other) constitutional protections and rights. An Unborn Child, who is an actual, *living* being, with substantial rights, is not recognized and is not afforded constitutional due process (and other) protections. The discrimination is naked and invidious.

6. *Naked Deprivation of Rights.* All of the rights of Unborn Children, described briefly above, and all of the rights of U.S. Citizen Abortion "Survivors" have been and continue to be destroyed or endangered by abortion. This occurred when they were denied effectively their life protections afforded by law and, in the case of Unborn Children, when their legal statuses were stripped from them, and, in place thereof, the Court fashioned a new "right" to kill by abortion. "Liberty" and "Property" are broad concepts, and "Life," of course, is the most basic right of all rights or interests. Courts sit to protect and adjust rights and interests, not provide for their destruction, particularly the Life Right. In *Roe* and *Doe*, this Court deprived *nakedly* the affected

Children of their rights to life, liberty and property by *fiat*. See *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

7. *Deprivation of Rights Without a Trial*. *Roe* and *Doe* were decided by the District Courts by way of summary judgment. There were no trials. Henry Wade did not submit even an Affidavit re the affected Children! Yet there were substantial factual (as well as legal) matters which needed presentation under the traditional safeguards of a trial, such as the time when human life commences scientifically, the characteristics of an unborn child as related to legal "personhood," viability, whether live births can result from abortion procedures and at what point(s), the needs of such "survivors," etc. If important matters such as these can be ignored, supplied by "judicial notice" or otherwise "missed," what purpose does a trial serve? As an appellate court in *Roe*, this Court should have confined itself to the case on the *record* before it, and not supplied missing factual or other matters.

8. *Violation of Procedural Due Process of Law*. The conduct of the Federal Courts, including this Court, under Subparagraphs 1, 2 and 7, above, constitute *rank violations* of procedural due process of law as to the Infant Victims of abortion. They were denied an opportunity to be heard on the most vital subjects imaginable to them. *Roe*'s 14th Amendment "nonpersonhood" holding could not be used to deny Unborn Children Victims such opportunity because they were *not* before the *Roe* Court in an "adversary" setting when that *very subject* was considered.

B. *Violation of the 9th Amendment*. Abortion "Survivors" and Unborn Children threatened and endangered by abortion were deprived of their 9th Amendment life rights when this Court denied them effectively their legal protections, and, in the case of Unborn Children, stripped them of their legal statuses. Moreover, they are *beneficiaries* of legal rights and recognitions by *other* People of the States. When the Federal District Courts and this Court in *Roe* and *Doe* refused to recognize and respect the life (and other) rights of such Children, the 9th Amendment was violated not only as to them, but as to the *other people* of Texas and Georgia who, through their legislatures and courts, recognized legal rights in or conferred them upon such Children.

C. *Violation of the Division of Powers Concept and the 10th Amendment*. The States of Texas and Georgia possess the clear right to legislate, etc. on domestic and property matters, including subjects such as the recognition, protection and conferral of rights upon Unborn Children within their borders. By refusing to recognize and respect the legitimate interests of Texas and Georgia in this sphere, the Court, as in *Swift v. Tyson*, 16 Pet. 1 (1842), denied power and authority belonging rightfully to these States, in violation of the Division of Powers Concept of the U.S. Constitution, as guaranteed by the 10th Amendment thereof. See *Erie R. v. Tompkins, supra*, 304 U.S. 64.

D. *Violation of the Supremacy Clause*. The Unborn Children in *Roe* had substantial Common Law property and other rights, including protection from death by abortion, which were carried forward from the laws of the Republic of Texas into Texas State law by the 1845 Annexation Accord. While some had statutory bases, most were part of the Common Law which the Republic adopted as the "rule of decision" by statute. See Appendix, *infra*. Most of these rights were in effect in Texas when *Roe* was decided, and, hence, were (and continue to be for the Unborn Children in this case) of Article VI status. Moreover, Unborn Children in Texas (and elsewhere in the United States) have substantial property rights or benefits under numerous federal statutes which, of course, are of Article VI status since made pursuant to the Constitution.[18] Finally, affected Unborn Children were entitled to be before the District Courts in *Roe* and *Doe* as indispensable parties under Rule 19, F.R. Civ. Proc., which has the force of a U.S. statute (See 28 U.S.C. 2072.) and, hence, such rights are of Article VI status. In *Roe* and *Doe*, this Court turned its collective back on, or was un-

[18] E.g., Social Security Act, Subchapter II, 42 U.S.C. 401 *et seq.* (insurance benefits), and *Wagner v. Finch, supra*, 413 F. 2d at 268-269; Social Security Act, Subchapter IV, Part A, 42 U.S.C. 611 *et seq.* (support benefits under State A.F.D.C. Programs), and 45 C.F.R. 233.90(c)(2)(ii); Longshoremen's and Harbor Worker' Compensation Act, 33 U.S.C. 901 *et seq.* (workmen's compensation benefits), and *Texas Employers' Ins. Ass'n. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969); Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674 (protection against tortious prenatal injury by U.S. Government), and *Sox v. United States*, 187 F. Supp. 465, 469, 470 (E.D.S.C., 1960).

aware of, these substantial rights of supremacy stature.

E. *Violation of Article III*. This Court abused and violated its appellate jurisdiction under Article III of the Constitution, as regulated by U.S. statutory law, by (1) violating or allowing to be violated the Constitution and fundamental principles of jurisdiction, discussed above, and (2) legislating without constitutional authority to do so. The Court legislated when it purported to elevate a deliberate act of human killing—a naked evil long recognized in the legal and social heritage of this Nation—to the status of a U.S. constitutional "right," and when it presumed to instruct the States of Texas and Georgia what they could and could not do with respect to exercises of *their* reserved authorities under the U.S. Constitution. Simply and directly put, this Court had no constitutional jurisdiction to do what it purported to do in *Roe*. The exercise of "raw judicial power," as Mr. Justice White put it in dissenting in *Roe* (410 U.S. at 222), has *no place* in the constitutional law of this Nation.

VI.

Roe v. Wade and Doe v. Bolton Violated Fundamental Principles of Personal Jurisdiction

Roe was decided without personal jurisdiction over the Infant Victims of abortion. The life protections of Unborn Children were removed and supplanted by a "liberty" to destroy them and, in the process, has led and continues to lead to the death of U.S. Citizen Abortion "Survivors."

Unborn Children were entitled clearly to be before the District Courts in *Roe* and *Doe*. E.g., *McArthur v. Scott*, *supra*, 113 U.S. at 391-392, 404; *Brantley v. Boone*, *supra*, 34 S.W. 2d at 411. So with Abortion "Survivors," who are U.S. Citizens. Since such Children were not before such Courts, the "Judgments" of such courts were *void* as to them and this voidness *infected* the review proceedings in this Court with corresponding voidness. See *Pennoyer v. Neff*, *supra*, 95 U.S. at 728; *Mallow v. Hinde*, 25 U.S. 193 (1827).

VIII.
Roe v. Wade, If a Lawful Decision, Revived Anti-Abortion Law in Texas of U.S. Constitutional Status Which Operates to Protect Unborn Children in the State from Abortion

If *Roe* is a lawful decision, it operated to revive, under the doctrine of revival, the prior anti-abortion law in Texas, which law is of Article VI status because carried forward from the Republic of Texas into the laws of the State of Texas by the 1845 Annexation Accord. See pp. 14-15, *supra*. This law operates to protect Unborn Children in Texas from death by abortion, and the Court of Appeals erred in refusing to give effect to such revived law by hearing the matter and granting the requested injunctive relief.

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the petition for a writ of certiorari should be granted.

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Attorney of Record for Petitioners

Appendix

APPENDIX

JUDGMENT OF THE COURT OF APPEALS IN DISPOSITION OF ORIGINAL PROCEEDING

[November 5, 1981]

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st Monday of October, A.D. 1981, present FRANK G. McDONALD, Chief Justice, and Associate Justices VIC HALL and JOHN A. JAMES, JR.

In the cause

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Relators,

No. 10-81-160-CV

vs.

Harris County Hospital District, Respondent,

the following order was entered:

"It is ordered that the Motion for Leave to File Petition for Temporary Injunctive Relief be, and hereby is, denied."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 5, Page 434.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Waco this 6th day of November A.D. 1981

[SEAL]

/s/ Robert G. Watts Clerk
Robert G. Watts

By _____ Deputy

ORDERS OF COURT OF APPEALS OVERRULING MOTION FOR REHEARING AND AMENDMENT TO MOTION FOR REHEARING

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Appeals for the Tenth Supreme Judicial District of the State of Texas, begun and holden at Waco on the 1st Monday of October, A.D. 1981, present FRANK G. McDONALD, Chief Justice, and Associate Justices VIC HALL and JOHN A. JAMES, JR.

In the cause

Rebecca P. Schwanecke, M.D., F.A.A.P., et al, Relators,

No. 10-81-160-CV

vs.

Original Proceeding

Harris County Hospital District, Respondent,

the following orders were entered on November 30, 1981:

"It is ordered that Relators' Motion for Rehearing be, and hereby is, OVERRULED."

"It is ordered that Relators' Amendment to Motion for Rehearing be, and hereby is, OVERRULED."

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at the City of Waco, hereby certify that the foregoing is a true copy of the orders entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 5, Page 438.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Waco this 9th day of December A.D. 1981

[SEAL]

/s/ Robert G. Watts Clerk
Robert G. Watts

By _____ Deputy

U.S. CONSTITUTIONAL, TEXAS ANNEXATION ACCORD (INCLUDING RELEVANT LAW FROM THE REPUBLIC OF TEXAS) AND FEDERAL RULE PROVISIONS INVOLVED

I. The U.S. Constitution provides, in pertinent part:

Article III:

Section 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;***.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5th Amendment:

[N]or shall any person be deprived of life, liberty, or property, without due process of law;***.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall

not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*** [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Legal Materials of, or applicable to, the Republic of Texas provide, in pertinent part:

A. Constitution of the Republic of Texas, adopted March 17, 1836 [3 *Tex. Const.* (Vernon's) (1955), p. 528]:

ARTICLE IV, Sec. 13:

The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.

B. An Act [of England] for consolidating and amending the Statutes in *England* relative to Offenses against the Person (9 Geo. IV, c. 31 (1828)]:

XIII. And be it enacted, That if any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting

such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any Person, with Intent to procure the Miscarriage of any Woman not being, or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding, or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for any Term not exceeding Fourteen Years nor less than Seven Years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any Term not exceeding Three Years, and if a Male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

C. Act [of the Republic of Texas] Punishing Crimes and Misdemeanors, approved December 21, 1836 (1 Gam., *Laws of Texas* at 1255):

All offenses known to the common law of England as now understood and practiced, which are not provided for in this act, shall be punished in the same manner as known to the said common law. (Sec. 54)

D. Act [of the Republic of Texas] To adopt the Common Law of England, etc., approved January 20, 1840 (2 Gam., *Laws of Texas* 177-178):

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall

continue in full force until altered or repealed by Congress (now covered by Art. 1, *V.T.C.S.*).

E. Act [of the Republic of Texas] To regulate the Descent and Distribution of Intestates' Estates, approved January 28, 1840 (2 Gam., *Laws of Texas* 306, 308):

Sec. 2. When any person having title to any estate of inheritance, either real, personal or mixed, shall die intestate as to such estate, it shall descend and pass in parcenary to his or her kindred, male and female, in the following cause, that is to say:—

Sec. 3. To his or her children and their descendants, if any there be.

* * *

Sec. 9. No right in the inheritance shall accrue to any persons whatsoever, other than to children of the intestate, unless they be in being and capable in law to take as heir at the time of the intestate's death.

F. Act [of the Republic of Texas] Concerning Wills, approved January 28, 1840 (2 Gam., *Laws of Texas* at 342):

Sec. 3. Be it further enacted, That no devise so made, or any clause thereof, shall be revocable but by the testator or testatrix, destroying, concealing or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil or declaration in writing, made as aforesaid, but every last will and testament, made when the testator had no child living, wherein, any child he might have is not provided for, or mentioned, if at the time of his death he leave a child, or leaves his wife enciente of a child, which shall be born, shall have no effect, during the life of such after-born child and shall be void unless the child die without having been married, and before he or she shall have attained the age of twenty-one years. When a testator shall have children born, and his wife enciente, the posthumous child or children, if unpro-

vided for, by settlement, and be pretermitted by his last will and testament, shall succeed to the same portion of the father's estate as such child would have been entitled to if the father had died intestate, towards which portion the devisees and legatees shall contribute proportionably out of the parts devised and bequeathed to them by the same will and testament.

Sec. 4. Be it further enacted, That if a testator leaving a child or children born, at the time of making and publishing his last will and testament, shall at his death, leave a child or children born after the making of his last will and testament, the child or children so after-born, if such child or children be unprovided for by settlement, and be pretermitted by the last will and testament, shall succeed to the same portion of the father's estate as such child or children would have been entitled to if the father had died intestate; towards raising which portion the devisees and legatees shall contribute proportionably out of the parts devised and bequeathed to them by the same will and testament, in the same manner as is provided in the case of posthumous children.

G. Act [of the Republic of Texas] Regulating the duties of Probate Courts, and the settlement of Succession, approved February 5, 1840 (2 Gam., *Laws of Texas* at 299-300):

Sec. 45. Be it further enacted, That any father or surviving mother, may by deed or last will and testament, (either of them being executed in the presence of two creditable witnesses) grant or devise the custody of a minor child which had never been married, although it be not born, during any part of the infancy of such child, to whomsoever he or she will; and such grant or devise shall give the grantee or devisee full power over the person of a child, and authorize him by action to recover the child with damages, for the wrongful taking of him or her, for his or her use; and for the same use to undertake the care and management, and receive the profits of the ward's estate, real and personal; and prosecute and

maintain all necessary action and suits concerning the same.

Sec. 46. Be it further enacted, That any guardian so appointed by the last will and testament of any person admitted to probate in any Court, shall before the exercise of any authority over the minor, or his estate, declare openly in said Court, his acceptance of said guardianship, which shall be recorded; and he shall give bond and security in the manner required of executors and administrators by this act; and the said guardian, and all guardians appointed by the Probate Court, before letters of guardianship are issued, shall take an oath for the faithful discharge of the duties of his trust.

III. The 1845 Annexation Accord between the Republic of Texas and the United States embraced the following pertinent legal materials or excerpts thereof:

A. Joint Resolution of the U.S. Congress, approved March 1, 1845 (5 *U.S. Stat.* 797-798):

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved.* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before

the first day of January, one thousand eight hundred and forty-six. *Second*. Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third*. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union, with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

B. Joint Resolution of the Ninth Congress of the Republic of Texas, approved June 23, 1845 (2 Gam., *Laws of Texas* 1225-1227):

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new

State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

* * *

[Terms of Resolution of U.S. Congress, above]

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the government of Texas doth consent, that the People and territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

* * *

C. An Ordinance approved on July 4, 1845, by the People of the Republic of Texas in Convention at Austin, Texas (2 Gam., *Laws of Texas* 1228-1230):

Whereas the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March one thousand eight hundred

and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

* * *

[Terms of the Resolution of the U.S. Congress, above]
Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled in their name and by their authority, do ordain and declaire, that we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

D. Texas Constitution of 1845 (2 Gam., *Laws of Texas* at 1293-1294, 1299, 1301):

ARTICLE SEVENTH:

Sec. 20. The rights of property and of action, which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; nor shall any rights or actions which have been divested, barred, or declared null and void by the Constitution and laws of the Republic of Texas, be reinvested, revived, or reinstated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.

ARTICLE THIRTEENTH:

[Sec. 3.] All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the Joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and

remain in force, as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.

Sec. 13. The ordinances passed by the Convention on the fourth day of July, assenting to the overtures for the annexation of Texas to the United States shall be attached to this Constitution, and form a part of the same.

E. Joint Resolution for the admission of the State of Texas into the Union, approved on December 29, 1845 (9 U.S. Stat. 108):

Whereas the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called *The State of Texas*, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the States of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said joint resolution; and whereas the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new State with a republican form of government, and, in the name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in said first and second sections of said resolution: and whereas the said constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution: Therefore—

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Sec. 2. *And be it further resolved,* That until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives.

Approved, December 29, 1845.

IV. Rule 19, F.R. Civ. Proc., provides, in pertinent part:

(a) *Persons to be Joined if Feasible*. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Opposition

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FEB 19 1982

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. 81-1369

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend for Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as Class,
NANCY BRECHERISEN, a Resident and Taxpayer of Harris County, Texas, and
BONNIE B. DUESING, a Resident and Taxpayer of Harris County, Texas, and
MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas, and
MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas, for Themselves and all Other Residents and Taxpayers of Harris County, Texas, who are situated similarly, as a Class,
Petitioners,

v.

HARRIS COUNTY HOSPITAL DISTRICT, a governmental body or political subdivision of the State of Texas,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U. S. SUPREME COURT FROM THE TEXAS COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. 81-1309

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend for Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as Class,
NANCY BRECHERISEN, a Resident and Taxpayer of Harris County, Texas, and
BONNIE B. DUESING, a Resident and Taxpayer of Harris County, Texas, and
MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas, and
MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas, for Themselves and all Other Residents and Taxpayers of Harris County, Texas, who are situated similarly, as a Class,
Petitioners,

v.

HARRIS COUNTY HOSPITAL DISTRICT, a governmental body or political subdivision of the State of Texas,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. SUPREME COURT FROM THE TEXAS COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, Harris County Hospital District, respectfully requests this Court to deny Petitioners' Application for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1257(3). Petitioners' Application seeks review of the Tenth Court of Appeals judgment in Rebecca P. Schwanecke, M.D., F.A.A.P., et al, v. Harris County Hospital

District, No. 10-81-160-CV, decided November 5, 1981, which denied Petitioners temporary injunctive relief pending appeal.

It should be noted that this appeal is pending in the Texas Appellate Court from a dismissal for mootness by the Trial Court. The only issue before the trial court when it dismissed the original action was whether Respondent's closure of its voluntary termination of pregnancy clinic eliminated any necessity for the granting of injunctive relief. Petitioners have contended throughout these proceeding that they will not be satisfied until they obtain the following:

1. A reversal of the principles established, by this Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).
2. Require the Respondent to implement a stated policy which prohibits the performance of abortions.
3. Require the Respondent to restrict all medical procedures performed within its facilities to prevent independent contractor physicians (not parties to the proceedings) from performing abortions.
4. Revive all common law criminal prohibitions against abortions in Texas.
5. Prohibit the expenditure of tax funds for the purpose of performing abortion procedures.

Petitioners claim to represent classes of taxpayers, alleged unborn children, and alleged born alive children who are allowed to die. It appears appropriate to point out that the trial court had not certified the existence of these classes at the time this case was dismissed.

Petitioners, after filing their appeal, sought original injunctive relief in the appellate court on the grounds that Respondent was continuing to perform abortions. This contention was based on two affidavits by unidentified persons who alleged that two abortions were performed on two of Respondent's patients. These affiants stated that in their opinions such abortions were unnecessary and that the fetuses were born alive and allowed to die. Such affidavits were on their face, however, filled with hearsay, speculation, and conclusions that appeared to be based upon insufficient facts or inadequate qualifications of the affiants to express such medical opinions. With the exception of these two isolated allegations, Petitioners cited no other basis for their request of relief to the appellate court.

Petitioners now seek to review the appellate court's denial of injunctive relief on the grounds that such denial violated their constitutional due process rights. Petitioners further seek this court's review of issues which were not reached by either the trial court or appellate court.

Respondent for the purposes of its brief will concern itself with the only question that has relevancy at this point, that being the jurisdiction of this court.

BASIS FOR DENIAL OF WRIT OF CERTIORARI

Respondent submits that this Honorable Court should deny Petitioners' application for certiorari for the following reasons:

1. The Texas appellate court's refusal to invoke injunctive remedies under Rule 383 Texas Rules of Civil Procedure (T.R.C.P.) and Article 1823 Vernon's Texas Civil

Statutes (V.T.C.S.) did not constitute a final appealable judgment.

2. The Texas appellate court's refusal to grant the Petitioners' injunctive relief does not constitute a denial of recognized constitutional rights and thus presents no federal question.

3. The Petitioners have failed to exhaust their state appellate remedies before seeking this writ of ceriorari.

4. The Petitioners have failed to present a direct injury sufficient to establish the necessary standing to invoke the Court's jurisdiction.

I

REFUSAL OF INJUNCTIVE RELIEF IS NOT A FINAL JUDGMENT

The jurisdiction of the United States Supreme Court pursuant to 28 U.S.C. § 1257(3) must be based as stated in *New York Times Company v. Jascalevich,* 439 U.S. 1317 (1978) on two prerequisites:

1. Rendition of a final judgment from the highest court in a state, capable of rendering such a judgment; and

2. A federal question properly raised in the state court which is necessary to the rendition of the final judgment.

It is well established that where a state court delivers no opinion (as in this case), and such decision may have rested upon non-federal grounds, and unless it affirmatively appears from the record that the federal question was presented to the highest state court authorized to

make a decision then this Court will not take jurisdiction to review the state court's decision, *Durley v. Mayo*, 351 U.S. 277 (1956). The denial of injunctive relief sought by Petitioners in the appellate court was based upon non-federal grounds under Article 1823 V.T.C.S. and Rule 383 T.R.C.P. These Texas laws are designed solely for the purpose of preserving the appellate court's jurisdiction of an appeal and do not authorize the granting of a direct remedy to the parties pending an appeal. See *Elliott v. Young*, 215 S.W.2d 898 (Tex. Civ. App.—Fort Worth 1948, no writ).

Article 1823 Vernon's Texas Civil Statutes provides:

> "Said courts and judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts."

Texas Courts indicate that this statute will permit an appellate court to issue writs of injunction in only two instances:

(1) To preserve the subject matter of appeal, and

(2) To prohibit an unlawful interference with the enforcement of the appellate court judgment.

See *Madison v. Martinez*, 42 S.W.2d 84 (Tex. Civ. App.—Dallas 1931, writ ref'd); *Collier v. Central National Bank*, 564 S.W.2d 828 (Tex. Civ. App.—Austin 1978, no writ).

Texas appellate courts have also recognized that the refusal of a district court to issue an injunction even though such refusal results in damage to or inconvenience to a party does not satisfy the requirements necessary for the issuance of a writ of injunction by the appellate court

under Article 1823, V.T.C.S. or Rule 383 T.R.C.P. See *Lee v. Lee,* 355 S.W.2d 255 (Tex. Civ. App.—Houston 1962, mand. overruled); *Wolf v. Young,* 275 S.W.2d 741 (Tex. Civ. App.—San Antonio 1955, no writ). *Justin Industries, Inc. v. Whiteside,* 606 S.W.2d 737 (Tex. Civ. App.—Fort Worth 1980, writ dism'd).

It should also be noted that Texas Appellate Courts are not mandated to establish a bond for the protection of an adverse party as a condition for the granting of original injunctive relief under Rule 383 T.R.C.P., and Article 1823 V.T.C.S. The reasoning being that the issuance by the appellate court of original injunctive relief is to preserve its jurisdiction and not to resolve the issues before it on their merits. *Nelson v. Blanco, Indep. School Dist.,* 386 S.W.2d 636 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); *Dawson v. First Nat. Bank of Troup,* 417 S.W.2d 652 (Tex. Civ. App.—Tyler 1967, no writ); *Powell v. Farm & Home Savings Assoc.,* 509 S.W.2d 734 (Tex. Civ. App.—Fort Worth 1974, no writ); *Collier v. Central National Bank, supra* at page 829; *Duncan v. Dripping Springs Independent School Dist.,* 612 S.W.2d 644 (Tex. Civ. App.—Austin 1981, no writ); Cliff, John W. and Sales, James B., "Jurisdiction In The Texas Supreme Court And Courts Of Civil Appeals," 26 Baylor Law Review 501 (1974).

Thus, the granting or refusal of an injunction by a Texas Appellate Court, being solely to preserve the court's jurisdiction pending the appeal, is neither final nor appealable. Such denial merely merges into the final judgment from the Court of Appeals which may be subsequently reviewed by the Texas Supreme Court. See *Leonard v. Small,* 28 S.W.2d 826 (Tex. Civ. App.—Fort Worth 1930, writ ref'd).

It is well established that this Court will not grant certiorari for the purpose of intervention where the case being brought before it is still open and remains unfinished or inconclusive. In *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1955) this Court referred to the appellate process of certiorari at Page 546:

> "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished, or inconclusive, there may be no intrusion by appeal."

While *Cohen* and its progeny did carve out exceptions to this general principle such as in *National Socialist Party of America v. Village of Skokie,* 432 U.S. 433 (1977); and *Mercantile National Bank of Dallas v. Langeau,* 371 U.S. 555 (1963), the case sub judice is not such a special exception, for no recognized constitutional rights have been denied Petitioners at this time. For a denial of constitutional rights to exist, it would have required the Texas courts to find that this Court's decisions in *Roe v. Wade,* and *Doe v. Bolton, supra,* were invalid. Further, Texas appellate courts have refused to create a right of appeal from an interlocutory order of a lower court even though collateral to the issues before such court absent a legal basis for such intervention under Texas law. *Permian Corp. v. Davis,* 610 S.W.2d 236 (Tex. Civ. App.—El Paso, 1981, writ ref'd).

Unlike the collateral doctrine cases previously noted, the issue of injunctive relief sought by Petitioners is the very heart of their case. In fact, the granting of injunctive relief here is so tied into the merits of this case that for the appellate court to grant the relief sought by Petitioners, it would, in essence, have to summarily decide the

entire case on a collateral injunctive matter, rather than preserving the court's jurisdiction to hear the merits of this case.

The appellate court's denial of injunctive relief then falls squarely in line with the *Cohen* reasoning that an appeal is a review and not an intervention. Texas law recognizes this exact reasoning and by precedent further insures due process to both parties by holding that ancillary injunctive relief sought in an appellate court is an interlocutory order that will merge into a final judgment still reviewable by the courts of Texas. This principle was recognized in *Leonard v. Small, supra,* where the court stated at page 827:

> "It is a familiar rule that, pending an appeal, this court has jurisdiction to grant ancillary writs, such as injunctions, to preserve the status of the property or matter in controversy until the appeal is decided, but it is quite clear that the material and controlling issue involved in this appeal cannot be summarily determined by a proceeding such as is now before this court. Accordingly, the application for the writ of mandamus now presented to this court is denied and refused, without prejudice, however, to the rights of the applicant to have the same questions determined when the appeal which he has prosecuted is heard."

See also, *Yturria Town and Imp. Co. v. Hidalgo County,* 114 S.W.2d 917 (Tex. Civ. App.—San Antonio 1938, no writ).

Thus, if the apellate court finds that Petitioners have a meritorious argument, it will reverse and remand this case for further proceedings. At this time Petitioners may

then present their evidence to support the granting of injunctive relief. See Rule 454 T.R.C.P. Should the appellate court affirm the trial court, then this affirmance is reviewable by writ of error to the Supreme Court of Texas. See Rule 467 T.R.C.P. Thus, for this Court to now grant Petitioners' writ of certiorari would amount to an intervention in the appellate process of the State of Texas.

II

NO FEDERAL QUESTIONS PRESENTED

Neither the trial court nor the appellate court was required to consider the due process questions presented by Petitioners. Nor were such due process questions necessary for a determination of the interlocutory order of the appellate court now in question. The trial court simply ruled on whether the Harris County Hospital District's closure of its voluntary termination of pregnancy clinic constituted by necessity the cessation of the performance of abortions sufficient to eliminate the necessity for Petitioners' injunctive relief. The appellate court has yet to determine the correctness of the trial court's decision. Neither court heard evidence with regard to abortion issues, personhood issues, or issues as to when life begins. On the state of the record before these courts such issues were unnecessary for a determination on the Petitioners' requested injunctive relief. Petitioners, however, have improperly sought to raise as a constitutional issue and therefore a federal question that the Texas laws including the Constitution of the Republic of Texas and the 1845 Annexation Accord conflict with the United States Constitution and the decisions of *Roe v. Wade,* and *Doe v. Bolton, supra.* The resolution of such issues were neither

considered nor necessary for the trial court's action. Respondent, in fact, would submit that the law of Texas is clearly in accord with the rulings of this Honorable Court and the United States Constitution with regard to abortions.

Article 16 § 48 of the present Texas Constitution states:

> "All laws and parts of laws now in force in the State of Texas, which are not repugnant to the Constitution of the United States, or to this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation or shall be amended or repealed by the Legislature."

And Article 1, Vernon's Texas Civil Statutes states:

> "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

In 1935 the Supreme Court of Texas in the case of *Diversion Lake Club v. Heath,* 86 S.W.2d 441 (Tex. 1935) stated:

> ". . . in Texas, only so much of common law of England has been adopted as is not inappropriate to the conditions and circumstances of the people and not in conflict with our Constitutions and laws. Article 1, R.S. 1925; Act approved January 20, 1840, 2 Gammel's Laws, p. 177 . . ." (further citations omitted).

The common law can only prevail in Texas when it is not inconsistent with the laws of this State or the United

States. See *Missouri - Kansas - Texas RR. Co. v. Shelton,* 383 S.W.2d 842 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.), cert. denied 382 U.S. 845 (1965).

To create a federal question Petitioners argue that the Texas Annexation Accord of 1840 turns back the clock of time in Texas to the common law of England in 1200 A.D. Petitioners refuse to accept the fact that there cannot be a revival of laws which have been stricken by this court. Thus, Petitioners cannot be allowed to invoke the jurisdiction of this Court based upon a federal conflict which by present law does not exist. In *Brady v. Doe,* 598 S.W.2d 339 (Tex. Civ. App.—Houston [14th] 1980, writ ref'd n.r.e.), cert. denied 499 U.S. 1081 (1981), the court of appeals stated:

> "Pursuant to the doctrine first enunciated in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), the Supreme Court's holding in *Roe v. Wade,* is the law of the land. Thus, prior to the end of the first trimester, the abortion decision must be left to the woman and her physician."

It is also interesting that even in England they are not presently following their own common law with regard to abortion. Like the State of Texas and the United States, the United Kingdom allows its citizens to choose an alternative of safe legal abortions. *Encyclopedia of Bioethics,* Finnis, J. M. "Abortion: Legal Aspects" (McMillan Publishing Co., New York, 1978).

Notwithstanding the above, Respondent would return to its original argument that these issues did not need to be decided by any of the lower courts when they denied Petitioners' requested injunctive relief.

III

FAILURE TO EXHAUST STATE REMEDIES

On the state of the record before this Court Petitioners fail to show that their due process contentions were ever properly presented to either the trial or appellate courts. Nor does the record show that such issue was ever necessary for a determination by the Texas courts. The Texas courts' orders denying Petitioners' injunctive relief did not pass upon any federal constitutional questions that may have been presented in the numerous briefs, motions, and memorandums submitted by Petitioners. This Court in *Black v. Cutter Laboratories,* 351 U.S. 292 (1956) stated at pages 297 and 298:

> "This Court, however, reviews judgments, not statements in opinions. *Herb v. Pitcairn,* 324 U.S. 117, 125, 126, 89 L.Ed. 789, 794, 795, 65 S.Ct. 459; *Morrison v. Watson,* 154 U.S. 111, 115, 38 L.Ed. 927, 929, 14 S.Ct. 995. See also, *Williams v. Norris,* (U.S.) 12 Wheat 117, 118, 120, 6 L.Ed. 571, 572. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Herb v. Pitcairn,* (U.S.) *supra; Williams v. Kaiser,* 324 U.S. 471, 477, 89 L.Ed. 398, 403, 65 S.Ct. 363."

It has long been recognized by this Court that it will not decide federal constitutional issues raised before it for the first time on review of a state court decision. See,

Cardinale v. Louisiana, 394 U.S. 437 (1969), and *Fuller v. Oregon,* 417 U.S. 40 (1974). Petitioners' application for writ of certiorari flies in the face of these decisions. Petitioners seek to invoke this Court's jurisdiction on an alleged due process violation, i.e., the Texas appellate court's refusal to invoke injunctive relief under Rule 383 T.R.C.P., and Article 1823 V.T.C.S. Petitioners attempt to raise this issue for the first time without the benefit of properly presenting this issue to the Texas Supreme Court for decision.

In *Cardinale v. Louisiana, supra,* this Court stated at page 438:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85 vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller for Use of United States v. Nicholls,* 4 Wheat, 311, 315, 4 L.Ed. 578 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.,* 360 U.S. 334, 342, n. 7, 79 S.Ct. 1196, 1201, 3 L.Ed.2d 1280 (1959);

> *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163, 65 S.Ct. 573, 576-577, 89 L.Ed. 812 (1945); *McGoldrick v. Compagnie Generale & Transatlantique,* 309 U.S. 430, 434-435, 60 S.Ct. 670, 672-673, 84 L.Ed. 849 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 47 S.Ct. 641, 643-644, 71 L.Ed. 1095 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201, 19 S.Ct. 379, 380-381, 43 L.Ed. 665 (1899); *Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875)."

Petitioners have failed to recognize or have intentionally ignored the fact that the Supreme Court of Texas has appellate jurisdiction over the construction or validity of state statutes.

Article 1728 Vernon's Texas Civil Statutes states in part:

> "The Supreme Court shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:
>
> * * * * *
>
> 3. Those involving the construction or validity of statutes necessary to a determination of the case."

Clearly, if the Court of Appeals was in error in not granting Petitioners' injunctive relief under Rule 383 T.R.C.P., and Article 1823 V.T.C.S., then the Supreme Court of Texas has jurisdiction to first review their action before a writ to this Court would apply. Petitioners by institution of this Application for writ attempt to circumvent the interlocutory nature of the Court of Appeals order denying injunctive relief. Since they did not first

attempt an appeal to the Texas Supreme Court, they most assuredly were aware that under Texas law an interlocutory order would not have been appealable. See *Magouink v. Williams*, 151 Tex. 260, 249 S.W.2d 185, (Tex. Comm. App. 1923).

Petitioners have again attempted to take a most circuitous route to bring before this Court for review its decision in *Roe v. Wade* and *Doe v. Bolton, supra,* but such is not the first attempt by Petitioners. See, *Brady v. Doe, supra.*

IV

PETITIONERS HAVE FAILED TO SHOW STANDING

It is clearly evident from Petitioners' application and the record of the courts below that there exists no standing by any of the persons now seeking to invoke the jurisdiction of this Court. Petitioners have totally failed to show that they have suffered by the actions of the lower courts.

The provision of Article III of the United States Constitution allows this Court to resolve "cases" and "controversies" not theoretical or philosophical disputes. Petitioners have resorted both in the lower courts and now in this Court to enforce their ideas and beliefs as to what medical procedures will be performed upon the patients of Respondent. They seek to have this Court involve itself in the area of a doctor/patient relationship which it has previously refused to do. See *Roe v. Wade,* and *Doe v. Bolton, supra.*

Petitioners are requesting this Court to ingraft upon the law their individual ideas of right and wrong. They

seek to have this Court enter an arena that it has for nearly 200 years wisely avoided.

In a very recent case *Valley Forge Christian College v. Americans United for Separation of Church and State,* Cause No. 80-327 ____U.S.____, 50 L.W. 4103 (1982) this Court stated at page 4105:

> "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' The constitutional power of federal courts cannot be denied and indeed has no substance without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' *Liverpool Steamship Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885). The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' *Chicago and Grand Trunk R. Co. v. Wellman,* 143 U.S. 339, 345 (1892). Otherwise, the power 'is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States.' *United States v. Ferreira.* 13 How. 40, 48 (1852).
>
> "As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit. The term 'standing'

subsumes a blend of constitutional requirements and prudential considerations, see *Warth v. Seldin,* 422 U.S. 490, 498 (1975). And it has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Art. III ex proprio vigore, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution. See, *Flast v. Cohen,* 392 U.S. at 97.

"A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the Court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' *Flast v. Cohen, supra,* at 97.

"The requirement of 'actual injury redressable by the court,' *Simon, supra,* at 39, serves several of the implicit policies embodied in Article III *Flast, supra,* at 96. It tends to assure that the questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The 'standing' requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case

with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

"The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972):

" 'The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.'

"The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the Court adjudicate.

"The exercise of the judicial power also affects relationships between the coequal arms of the national government. The effect is, of course, most vivid when a federal court declares unconstitutional an Act of the Legislative or Executive branch. While the exercise of that 'ultimate and supreme function,'

> *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. at 345, is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since *Marbury v. Madison*, 1 Cranch 137 (1803), it has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence: . . ."

Thus, Petitioners have, as in the case above, not shown that they possess the necessary direct stake in the outcome of this case to permit this Court to grant their application for writ of certiorari.

CONCLUSION

For each of the reasons stated above Respondent would respectfully submit that this petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Respondent's Brief in Opposition have been furnished to Richard W. Schmude, P. O. Box 674, Tomball, Texas 77375, by certified mail, return receipt requested, on this the 18th day of February, 1982.

Oliver J. Guiberteau

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Petitioner's Reply Brief

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No. 81-1369

In the Supreme Court of the United States

OCTOBER TERM, 1981

REBECCA P. SCHWANECKE, M.D., F.A.A.P., as Next Friend for Certain Minor Unborn Children and Certain Minor Recently Born Children, for and in behalf of such Minor Children, as a Class,

NANCY BRECHEISEN, a Resident and Taxpayer of Harris County, Texas,

BONNIE B. DUESING, a Resident and Taxpayer of Harris County, Texas, and

MARGIT M. WINSTROM, M.D., a Resident and Taxpayer of Harris County, Texas,

for themselves and all other Residents and Taxpayers of Harris County, Texas, who are situated similarly, as a Class,

Petitioners,

v.

HARRIS COUNTY HOSPITAL DISTRICT, a governmental body or political subdivision of the State of Texas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In its Brief In Opposition ("Brief"), Respondent set forth four essential bases for the denial by this Court of the Petition for a Writ of Certiorari ("Petition"). These grounds do not address the merits of the Petition. Instead, they deal with ancillary, but important, matters of this Court's jurisdiction and appropriateness of proceeding in the premises. None, however, has any merit, and the Petitioners are hereby addressing them in the order in which presented.

The *narrow* question before this Court is whether the Court of Appeals violated the due process clause of the 14th Amendment and the Ninth Amendment to the U.S. Constitution when it refused to consider further and to enjoin *temporarily*, for purposes of preserving the Court's appellate jurisdiction involving the Petitioners in a related appeal before that Court, any further human experimentation and abortion conduct engaged or assisted in by Respondent and affecting Petitioners. This question, of course, involves and requires appraisal of this Court's Judgments and Decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). However, Petitioners stress that the injunctive relief sought at bar is narrow since

- it would be *temporary*, lasting only until Petitioners' appeal could be decided by the Court of Appeals; and
- it would be for purposes of *preserving the appellate jurisdiction* of the Court of Appeals in a case involving abortion or abortion-related conduct of a political subdivision of the State of Texas.

Roe v. Wade, of course, did *not* involve such a question, and since this Court has made it clear that *Roe* should *not* be applied to situations which were not before the Court in *Roe* [*Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975)], it follows that the Court of Appeals was obligated constitutionally to grant the relief requested, even assuming that *Roe v. Wade* and *Doe v. Bolton* are lawful decisions.

The *broad* question before this Court is whether *Roe* and *Doe* should be overruled as a result of

- new factual data,
- new legal data,
- unintended consequences (including, as in this case, the experimentation on, and *murder* of, a U.S. Citizen Abortion "Survivor"),
- the unconstitutionality of such decisions, and
- the absence of personal jurisdiction over (1) U.S. Citizen Abortion "Survivors" who die because of *Roe* and *Doe*, and (2) Unborn Children who were not before the Court, through a Next Friend or Guardian, in an adversary setting when their constitutional "personhood" status was determined against them.

These questions need resolution by this Court. They are of utmost importance to Victims of Experimentation, Victims of Abortion, affected Taxpayers and Others.

ARGUMENT

I.
This Court Has Jurisdiction To Review the Judgment of the Court of Appeals

1. At the threshold, Respondent contends that this Court lacks jurisdiction to review the Judgment at bar because it is based on "non-federal grounds" and because it is not final and appealable (Brief, pp. 4-6). Respondent is wrong on each count.

The Petition is *not* grounded upon the adverse Texas District Court Judgment or on the appeal therefrom which is pending currently in the Court of Appeals ("said appeal"). Instead, it is based on the denial by the Court of Appeals of temporary injunctive consideration and relief sought in a separate, *original proceeding* in that Court for purposes of preserving appellate jurisdiction over said appeal. Specifically, Petitioners showed that their respective rights which were before the Court of Appeals on said appeal were being threatened, endangered and/or destroyed by abortion at Respondent's Jefferson Davis Hospital facility, and that, to preserve the Court's appellate jurisdiction over

them and their rights, they required that Respondent be enjoined *temporarily* from engaging or assisting in, at it facilities, *any further* human experimentation or physical abuse of any Petitioner who is alive after an abortion and any further abortion conduct (except maternal life saving abortions) affecting them.

This was a separate and original proceeding, with separate pleadings, a separate required brief, a separate case number, a separate docket, separate legal standards for application (under Rule 483, *T.R.C.P.*), separate and temporary relief (under Art. 1823, *V.T.C.S.*) and separate handling by the Court. As set forth in the Petition, the reach of Art. 1823 is broad, the Courts of Appeals (formerly called Courts of Civil Appeals) have demonstrated a clear willingness to grant temporary injunctive relief in *nonabortion cases*, and the standard which Petitioners were required to meet "tentative opinion" of relief entitlement) was easy to meet (and was met) by Petitioners.

To say that Petitioners were denied relief on "non-federal grounds" (Brief, p. 5) is to ignore reality. Petitioners were denied relief because of the perceived reach of *this Court's* decision in *Roe v. Wade*, 410 U.S. 113 (1973), *despite* Petitioners argument against the applicability and lawfulness of that decision. In short, the rights which Petitioners invoked under the United States Constitution and laws were rebuffed by *Roe v. Wade*.

As for the asserted lack of finality of the Court's Judgment, there simply is no question but that that Judgment became final after the Court overruled Petitioners' Motion and Amendment to Motion for Rehearing. At that point, the original proceeding was terminated *completely*, and since the case was an *original* one in the Court of Appeals, the Supreme Court of Texas was *without jurisdiction* to review the correctness of that Judgment. See Arts. 1728 and 1729, *V.T.C.S.; Long v. Martin*, 285 S.W. 1075, 1077 (S.C. Tex., 1926); *Quinn v. Harbrook*, 285 S.W. 1079 (S.C. Tex., 1926). Accordingly, this Court has jurisdiction to grant certiorari under 28 U.S.C. 1257(3) since the Judgment before this Court is from the highest Court in Texas with any judicial authority over same and involves substantial questions under the United States Constitution and laws.

The Court's Judgment turned out to be *especially cruel* to the Petitioners because Respondent *refused* subsequently Petitioners' re-

quest that the appeal be expedited (through argument and submission of the case in Waco, Texas, where the Court of Appeals sits regularly). The upshot is that the case will not even be argued until the Court comes to Houston, apparently in the latter part of 1982, and Petitioners will continue to be threatened, endangered and/or destroyed in their rights postures while their *very appeal* awaits attention.[1]

2. Next, Respondent claims (Brief, pp. 7-9) that a grant of certiorari would interfere improperly with the "appellate process" in Texas (involving said appeal). Respondent, however, apparently fails to grasp the nature of an original proceeding. There is no "appellate process" available for the instant, original case. That case is finished, period; and there simply is no way that rights destroyed during the pendency of appeal can be restored or, for that matter, even be addressed properly.

Moreover, the constitutional rights of the Petitioners—as pressed before the Court of Appeals and in the Petition in this Court—have been, are being and will continue to be threatened, endangered and/or destroyed by abortion or the "ethic" of abortion at Respondent's facilities. This alone is sufficient to warrant certiorari, particularly where the destruction of such rights stems *directly* from *Roe* and *Doe*.

Finally, even if said appeal is taken into account, a grant of certiorari and resolution of the *narrow* question presented (*supra*, p. 1) could hardly interfere with resolution of the *mootness* and *other questions* (refusal to certify class, refusal to appoint a guardian ad litem and dismissal of the case as to two of the appellants) presented on said appeal. See *Nat. Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977); see also, *Mercantile Nat. Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963). If this Court were to resolve the *broad* as well as the narrow question (*supra*, p. 2), such resolution would not interfere with said appeal. Instead, it would affect the lawsuit out of which said appeal arose; but such an effect occurs in the course of any appellate decision of more than limited scope and would not be unwarranted.

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[1] Said appeal together with about 90 other Harris County (or vicinity) cases were transferred in October 1981 from the Court of Appeals for the First Supreme Judicial District of Texas, at Houston, to the Court of Appeals for the Tenth Supreme Judicial District of Texas, at Waco. This was per Order from the Supreme Court of Texas.

Respondent claims that "no recognized constitutional rights have been denied Petitioners at this time" because, for such rights to have denied, "it would have required" a finding that *Roe v. Wade* and *Doe v. Bolton* were invalid. This, however, is a non-sequitur. *Roe* and *Doe*, which dealt with a *private* (physician/patient) matter, have no application to the abortional killing of children by a political subdivision of Texas, at *public facilities*, and with the use of *public* funds [See Pet., pp. 10-11, and *Connecticut v. Menillo*, *supra*, 423 U.S. at 10-11.]. The great object of state government is *not* to take human life; it is to *protect* such life.

If, however, *Roe* and *Doe* were considered to apply, those Judgments and Decisions would not operate to nullify the constitutional rights pressed by Petitioners because (1) they are *absolutely void* as violative of the United States Constitution and Fundamental Principles of Personal Jurisdiction (Pet., pp. 24-28), and (2) they do not address *all* of the rights advanced by the Petitioners (e.g., the constitutional rights of U.S. Citizen Abortion "Survivor" Children). All of these points were raised and pressed by Petitioners before the Court of Appeals.

II.
This Case Presents Numerous Federal Questions

Respondent contends (Brief, pp. 9-11) that the case does not present federal constitutional questions because neither the trial court nor the appellate court was required to consider the "due process question" which Petitioners have presented. Apart from the fact that Petitioners presented *more* than a "due process question," the short of the matter is that the trial court had *nothing* to do with the instant case, which was an *original proceeding* in the *Court of Appeals*, and the Court of Appeals had before it *all* of the federal questions advanced in the Petition for Certiorari *plus* a complete record of related evidentiary and legal matters relevant thereto.

Respondent creates a false impression when it asserts that "Neither court [trial and appellate] heard evidence with regard to abortion issues, personhood issues, or issues as to when life begins" (Brief, p. 9). The fact of the matter is that a *full evidentiary record* was made by Petitioners and Respondent before the trial court; that this record

consisted primarily of numerous afffidavits and an *extensive stipulation of facts* (on which the parties relied in filing their respective motions for summary judgment before the trial court);[2] that this record covered Respondent's abortion procedures and abortion policies, the commencement of human life, the characteristics of such life, Respondent's use of tax funds for abortion purposes, abortion "survivors," etc.; that Petitioners relied in part on various aspects of such record plus affidavits showing the continuance of abortions at Respondent's Jefferson Davis Hospital facility *after* Respondent was forced to close its abortion clinic, the experimentation and *murder* of an Abortion "Survivor," the continuation of Respondent's liberal abortion policy, etc.; and that this record was incorporated into the instant original proceeding. (See also, Brief pp. 8-9).

In the instant case, Petitioners raised and pressed *numerous* federal constitutional questions which are now before this Court, including the denial of constitutional rights under the 9th and 14th Amendments as a result of the Court's denial of relief in such case. These questions are before this Court properly in the Petition.[3]

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[2] The trial court did not pass on the motion for summary judgment despite the fact that it was scheduled to hear same. Instead, on the day of the hearing the court (Hon. Ruby K. Sondock, District Judge) announced that she would hear Respondent's motion to dismiss the case on grounds of mootness, and dismissed the case as "moot" because *she* happened to be of the *opinion* that abortions no longer were being performed at Respondent's facilities!

[3] Respondent appears to misunderstand Petitioners' federal question relative to revival of Texas' prior anti-abortion law. Petitioners' point is simply that, if *Roe* is a lawful decision, it operated to revive, as law in Texas, the prior criminal anti-abortion law (adopted English law), and such prior anti-abortion law is of U.S. Constitutional status under Article VI because it was part of the 1845 Annexation Accord between the United States and the Republic of Texas. The 1845 Accord is fully executed, and the law so carried forward therein, not being violative of the U.S. Constitution, may not be altered save by the Texas Legislature. This law, so revived under the doctrine of revival, protects Petitioner Children from death by abortion. Issues, like this one, which were not before this Court in *Roe*, are not governed by *Roe*. See *Connecticut v. Menillo*, *supra*, 423 U.S. at 10.

III.
All State Remedies Were Exhausted

Respondent argues (Brief, pp. 12-15) that the Texas Courts "did not pass on any federal constitutional questions" that Petitioners may have presented, and that Petitioners are attempting to raise federal constitutional questions dealing with the denial of injunctive relief "without the benefit of properly presenting this issue to the Texas Supreme Court" (*id.*, p. 13). The short answer, however, is that the District Court simply was not involved in the instant case, which was an original proceeding in the Court of Appeals; that the Court of Appeals *did* pass upon the federal constitutional questions with its Judgment at issue and when it overruled Petitioners' Motion and Amendment to Motion for Rehearing; and that Petitioners have *no Texas remedy* for the denial of relief *in this case*. In this latter regard, and as explained above, the Texas Supreme Court lacks appellate jurisdiction to review the corrections of a denial of relief in an *original proceeding* in the Court of Appeals. In the meantime, Petitioners not only continue to stand endangered, etc. but this situation promises to be a long one. See p. 4, above.

IV.
Petitioners Have Legal Standing To Be Heard

Finally, Respondent contends that this Court should not grant certiorari because the Petitioners lack standing to be heard in the case (Brief, pp. 15-19). Apart from the fact that Respondent did not raise this complaint before the Court of Appeals, it is preposterous to say that

- Unborn Children Petitioners who are threatened, endangered and/or destroyed by abortion at Respondent's facilities,
- Abortion "Survivor" Petitioners who "survive" abortion only to die at such facilities, and
- Taxpayer Petitioners, whose tax monies are used for unlawful abortion purposes at such facilities, lack a "direct stake" in the outcome of the case (Brief, p. 19).

There is *no question* but that Taxpayers in Texas have legal standing to challenge the lawfulness of the expenditure of tax monies which they, in part, have paid. *Scott v. Graham*, 292 S.W. 2d 324, 329

(S.C. Tex., 1956); *City of Austin v. McCall*, 68 S.W. 791, 794 (S.C. Tex., 1902). Indeed, even a single taxpayer, whose tax monies are extremely small in relation to the whole, has such standing in Texas. *Terrell v. Middleton*, 187 S.W. 367, 369 (Tex. Civ. App.—San Antonio, 1916), err. ref. The three individual Taxpayer Petitioners, though not required so to do [*South Texas Pub. Co. v. Jahn*, 7 S.W. 2d 942, 945-946 (Tex. Civ. App.—Austin, 1928), err. ref.], have set forth substantial, additional interests in the litigation (Tr. 9, 208, 210-211). These individuals are representing a Class of similarly situated Residents and Taxpayers under the equitable doctrine of virtual representation, as the same is recognized in Texas. See Rule 693, *T.R.C.P.*; *Peters v. Allen*, 296 S.W. 929, 933 (Tex. Civ. App.—San Antonio, 1927), no writ; *Johnston v. Johnston*, 276 S.W. 776, 779 (Tex. Civ. App.—Dallas, 1925), no writ.[4]

The Abortion "Survivors" are, of course, U.S. Citizens under Section 1 of the 14th Amendment to the U.S. Constitution. Their rights are recognized expressly under Texas law. *Tex. Family Code*, § 12.05. The record in this case shows that one Abortion "Survivor," a Boy, *was murdered* at Respondent's Jefferson Davis Hospital on July 3, 1981; and another "Survivor," a Girl, died on September 15, 1981, eight days after her birth there. U.S. Citizens such as these surely have a sufficient interest in the controversy to be heard when their *very lives* are at stake. They were represented properly before the Court of Appeals through Dr. Rebecca P. Schwanecke, as their Next Friend, and were before the Court as a plural group or as a Class under the doctrine of virtual representation. See the authorities immediately, above.

Finally, Unborn Children, who have legal personalities under Texas (and other law) are entitled to be heard in judicial proceedings

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[4]Respondent points out (Brief, p. 2) that the trial court did not certify Petitioner Classes. That action, however, relates only to said appeal, which is not here involved. What is significant is the fact that all of the Classes at issue—Taxpayers, Abortion "Survivors" and Unborn Children—were before the Court of Appeals under the doctrine of virtual representation. The Court of Appeals expressed no difficulty with these Classes, nor did Respondent object to their presence. (Rule 42, *T.R.C.P.*, covering class actions, does not lend itself to proceedings for emergency appellate relief.)

which affect them or their property rights. They may be heard through a next friend on an individual basis or through a representative of a class to which they belong in whole or in part. *Mitchell v. Mitchell*, 244 S.W. 2d 803, 804 (S.C. Tex., 1951) (unborn children as part of a class); *Bradley v. Henry*, 239 S.W. 2d 404, 405 (Tex. Civ. App.—Fort Worth, 1951), no writ (unborn children comprising the entire class); *Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ (individual unborn child represented); see *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1886). They, too, were before the Court properly through Dr. Schwanecke, as their Next Friend; as a plural group or as a Class under the doctrine of virtual representation, above.[5]

Moreover, the Court of Appeals had no trouble whatsoever with the legal standing of the Petitioners. It did not *dismiss* their application for lack of standing, as it *could* have done. Instead, it entertained same and ruled against it through the Judgment at issue.

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[5] *Brady v. Doe*, 598 S.W. 2d 338, 339 [Tex. Civ. App.—Houston (14th), 1980], err. ef. n.r.e., *cert. denied*, 499 U.S. 1081 (1981), which held to the contrary, is *void* because (1) its holding of nonstanding for an abortion-endangered child was premised on *Roe v. Wade*, which, as shown in the Petition (Pet., pp. 24-28), is *void* as violative of the U.S. Constitution and Fundamental Principles of Personal Jurisdiction, and (2) it directly contravened the existing criminal anti-abortion law of Texas of U.S. Constitution stature (Art. VI, Supremacy Clause) which was revived, under the doctrine of revival, if it is assumed, *arguendo*, that Roe is a lawful decision.

CONCLUSION

For the reasons and authorities stated herein and in the Petition for a Writ of Certiorari, it is submitted respectfully that the Petition should be granted.

Respectfully submitted,

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